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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1931

No. 137

MATSON NAVIGATION COMPANY, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JUNE 5, 1931

CERTIORARI GRANTED OCTOBER 12, 1931

(35,951)

(35,951)

SUPREME COURT OF THE UNITED STATES

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MATSON NAVIGATION COMPANY, PETITIONER,

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 9, 1931

[fol. 1]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 137

MATSON NAVIGATION COMPANY, a Corporation, Petitioner,

vs.

THE UNITED STATES, Respondent

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of Matson Navigation Company respectfully shows to this Honorable Court:

A

Summary Statement of the Matter Involved

On April 6, 1931, the Court of Claims made its decree dismissing a petition of Matson Navigation Company (hereinafter referred to as "The Matson Company") upon the ground that the Court was without jurisdiction to hear the cause. On May 11, 1931, the Court of Claims filed a new decree and opinion containing a finding of the facts upon which the decree was based.

The action was commenced by a petition which claimed a balance due to the Matson Company from the United States upon a mutual, open, current and running account in the sum of $49,373.11. This account arose out of the following transactions which are described by the petition:

[fol. 2] Acting on behalf of the United States by authority of an Act of June 15, 1917, entitled "Urgent-Deficiencies Appropriations Act" (40 Stat. L. 182, Ch. 29), and an Executive Order of the President promulgated thereunder, the United States Shipping Board, on October 15, 1917, issued an order requisitioning American cargo vessels of certain classes. Among the vessels so requisitioned were seven steamships then owned and operated by The Matson

Company. The Matson Company promptly delivered these seven vessels to the United States. The United States used the vessels until the early part of 1919, when they were returned to the owner.

On December 29, 1917, the United States and The Matson Company entered into seven separate agreements which provided for liquidation of the just compensation to be paid for the use of the vessels. Each of these agreements provided two separate standards of compensation. One standard was applicable while vessels were operated by the owner for the United States, the other while the vessels were not so operated. Each of the petitioner's vessels were to be operated by it for the United States. Under the agreements, the compensation to be paid by the United States for the use of the vessels consisted in part of pay at a rate to be established from time to time by the United States Shipping Board and in part of the amount of all increased wages and bonuses paid to the master, officers and crew of each vessel in excess of standard prevailing on August 1, 1917.

The Matson Company also represented the United States in the management of these and other vessels.

From the date of the seizure of these vessels until December of 1922, the petitioner and the United States Ship- [fol. 3] ping Board maintained a mutual, open, current and running book account, wherein there was credited to the petitioner and charged to the United States, from time to time, various sums, including the just compensation to which the petitioner was entitled for the use of its vessels, and wherein there was credited to the United States and charged to the petitioner various other sums, including all revenue arising from the operation of the vessels.

After December of 1922, pursuant to the provisions of the Merchant Marine Act of 1920 (41 Stats. L. 988), the United States Shipping Board and the petitioner negotiated for the settlement of this account. The account was finally settled on October 18, 1926. At that time the petitioner received payment of the balance of the account except the sum of $49,373.11, which is here in dispute and which represents credits which the Shipping Board then decided had been improperly made to the petitioner but which the petitioner claimed to have been properly credited as compensation for the use of its vessels while under

requisition. The amount in dispute was measured by the proper increases, over the standard prevailing on August 1, 1917, in wages and bonuses which had been paid to the master, officers and crew of each of the requisitioned vessels.

The final settlement of the account between The Matson Company and the United States was evidenced by a written agreement dated October 18, 1926, which specifically saved and reserved to The Matson Company all of its claims and demands for this balance of $49,373.11 which it claimed from the United States.

The petition of The Matson Company in the Court of [fol. 4] Claims seeking to recover this amount was filed on April 6, 1927. On the following day The Matson Company filed in the United States District Court for the Northern District of California (Southern Division) seven actions in each of which The Matson Company sought to recover judgment for the balance of hire due from the United States for the use of one of its seven vessels.

Upon motion of the defendant the proceeding in the Court of Claims was dismissed on the ground that the Court of Claims had no jurisdiction to hear the cause.

The decree of the Court was based upon an Act of Congress (U. S. C. A. Title 28, Sec. 260; Judicial Code, Sec. 154), which provides as follows:

"No person shall file or prosecute in the Court of Claims or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person, who at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately under the authority of the United States."

Reasons for the Allowance of the Writ

(1) The Court's decree is erroneous because it is based upon an erroneous construction of the Statute.

The action pending in the Court of Claims was one in which the United States itself was defendant. In each action pending in the District Court of the United States the United States itself was also the sole defendant. The

Statute prohibits the prosecution of an action in the Court of Claims only when there is pending in any other court any suit

"against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States."

[fol. 5] No action has ever been filed in connection with the subject of this litigation against any person whomsoever. The actions pending are all against the United States. There is no statutory prohibition against filing more than one proceeding against the United States.

The Court of Claims has construed this statute as prohibiting the maintenance of two actions against the United States when, in fact, the statute contains no such provision. The Court of Claims holds that:

"The whole object and intent of the Act of 1868 were to prevent the government from being sued in separate jurisdictions on the same cause of action and to make the plaintiff elect in which Court to sue."

The Statute discloses no such intent and contains no such provision. The Act does not refer to suits against the United States in other jurisdictions or other courts. It does not refer to any election with reference to the forum.

It is submitted that the Court of Claims has decided an important question of law in a way which is wholly untenable.

(2) The construction placed by the Court of Claims upon the Statute in question violates the principles that statutory language must be construed in its natural, plain and ordinary signification and that a departure from this plain meaning is unjustified. The Statute prohibits the prosecution of a proceeding in the Court of Claims only when other proceedings are pending against persons acting under the authority of the United States. The language is clear. It cannot apply or refer to proceedings pending against the United States itself.

(3) The Court of Claims construes this Statute in a manner which conflicts with applicable decisions of this [fol. 6] Court; its decision violates the principle that in the construction of a statute *expressio unius est exclusio alterius* and that an enumeration of matters upon which a statute shall operate excludes all others. The Act of Congress expressly designates proceedings to which it refers, to wit: proceedings pending in other courts against persons acting under the authority of the United States. A designation of this class of persons excludes the United States itself.

(4) The Court of Claims erroneously held that:

"If the Court of Claims is deprived of jurisdiction when a suit is filed on the same cause of action in another court against any person who, at the time the cause of action arose, was acting or claiming to act under the authority of the United States, *a fortiori*, would it be true where the suit was brought against the United States on the same cause of action in another court and also in the Court of Claims."

This statement wholly ignores the well-settled rule established by the decisions of this court, that a judgment rendered in an action against an agent or officer of the United States, unlike a judgment rendered in an action against the United States itself, is not *res adjudicata* in a subsequent action to which the United States is a party. Suits against individuals acting under the authority of the United States are in a wholly separate and distinct category from suits against the United States itself. The rules applicable to the former category do not, *a fortiori* or otherwise, apply in the latter.

(5) The Court of Claims erroneously stated:

"The Government must defend the suits in two jurisdictions, and the whole aim of the statute was to prevent two trials of the same cause of action in separate jurisdictions."

This statement by the Court of Claims erroneously attributes to the Statute an aim which is foreign to its real [fol. 7] purpose and ignores the well-settled doctrine of

res adjudicata. A judgment for the Government and against an individual upon a claim of the latter creates a bar by estoppel in any subsequent proceeding involving the same issues and relieves the government of any need to again defeat the claim.

(7) The construction placed by the Court of Claims upon this statute not only ignores the language of the Act of Congress but also its legislative history (Congressional Globe, Second Session, Fortieth Congress, p. 2769), which shows that the purpose of Congress was to accomplish exactly what the Act provides and nothing more.

The decision of the Court of Claims involves the jurisdiction of that court and the construction of the Act of Congress defining the same, and the case is, therefore, one of general interest and importance. The opinion is based upon a supposed doctrine of *res adjudicata,* which is at variance with the decisions of this court, as well as with the prior decisions of the Court of Claims. The decision of the Court of Claims would compel a citizen who was in doubt as to the proper forum in which to sue the United States to select one of the available forums and, pending the settlement of the question of jurisdiction, would prevent him from protecting his right in any other forum. This right would be taken from the claimant without any legislative justification of sanction whatever.

Wherefore your petitioner prays that this Honorable Court grant a writ of certiorari in this case, directed to the Court of Claims, to the end that this cause may be brought up to this Honorable Court in such proceedings as to this Honorable Court may seem proper and appropriate and that the said decree of the Court of Claims may be reversed by this Honorable Court and that your petitioners may [fols. 8 & 9] have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated San Francisco, California, June 2nd, 1931.

Matson Navigation Company, by Herman Phleger, Maurice E. Harrison, Howard J. Finn, Gregory A. Harrison, Attorneys for Petitioner. M. A. Crum, William G. Feely, of Counsel.

[fol. 1] IN THE COURT OF CLAIMS

No. H-137

MATSON NAVIGATION COMPANY (a Corporation)

vs.

UNITED STATES OF AMERICA

I. PETITION—Filed April 6, 1927

To the Honorable the Court of Claims:

The petition of Matson Navigation Company respectfully shows:

I

That said claimant is, and was at all times herein mentioned, a corporation duly organized and existing under and pursuant to the laws of the State of California, and having its principal place of business in the City and County of San Francisco, State of California;

II

That said claimant is, and was at all times herein mentioned, engaged in the business of transporting passengers and goods between points on the Pacific Coast of the mainland of the United States and points in the Hawaiian Islands, and in its said business said claimant has at all times herein mentioned owned and operated the following named vessels, each over 2500 tons burden, to wit: "Mat-
[fol. 2] sonia", "Maui", "Wilhelmina", "Manoa", "Lurline", "Enterprise" and "Hyades";

III

That on June 15, 1917, an act of Congress entitled "Urgent-Deficiencies Appropriation Act" (40 Stat. L. 182, Ch. 29) was approved; that a section of said act entitled "Emergency Shipping Fund" authorized and empowered the President of the United States to purchase, requisition or take over the title to, or the possession of, for the use or operation by the United States, any vessel then constructed or in the course of construction; that said act

further provided that the powers of the President conferred upon him by the terms thereof might be exercised through such agency or agencies as the President should determine from time to time;

IV

That pursuant to said authority contained in said statute the President of the United States duly promulgated on the 11th day of July, 1917, an executive order wherein and whereby the said President directed that the United States Shipping Board should have and exercise all of the powers and authority conferred upon the President in and by the terms of said section of said act, so far as applicable to, and in furtherance of, the taking over of title or possession by purchase and requisition of constructed vessels or parts thereof, or charters therein;

V

That on the 15th day of October, 1917, the United States Shipping Board, pursuant to the authority delegated to it by said executive order, requisitioned for use by the United States, all of said claimant's vessels of over 2500 tons burden then in port in the United States, and requisitioned all such vessels of the claimant not in port in the United States upon their arrival thereafter; that the vessels of claimant hereinbefore named were requisitioned by the United States, so acting by and through the United States [fol. 3] Shipping Board, on the following dates, to wit: the "Matsonia" on October 27, 1917; the "Maui" on October 13, 1917; the "Wilhelmina" on November 5, 1917; the "Manoa" on November 16, 1917; the "Lurline" on October 29, 1917; the "Enterprise" on October 17, 1917; and the "Hyades" on November 13, 1917;

VI

That on the 29th day of December, 1917, the United States of America, acting by and through the United States Shipping Board, entered into seven separate requisition charters in writing with the claimant, in and by each of which said requisition charters the compensation to be paid to the claimant for the use of said vessels by the United

States as aforesaid was fixed; that each of said requisition charters was in the form hereunto annexed, marked Exhibit "A", which is hereby expressly referred to and made a part of this petition;

VII

That the said vessels so requisitioned by the defendant were returned to the claimant on the following dates, to wit: the "Matsonia" on September 17, 1919; the "Maui" on September 8, 1919; the "Wilhelmina" on August 16, 1919; the "Manoa" on April 4, 1919; the "Lurline" on January 31, 1919; the "Enterprise" on January 17, 1919; and the "Hyades" on April 13, 1919;

VIII

That in and by the terms of said requisition charters the defendant agreed to pay to claimant for the use of each such vessel at a monthly rate which would thereafter be established from time to time by the United States Shipping Board and in addition thereto, to reimburse the owner for any proper increases in wages and bonuses over the standard prevailing August 1, 1917, for master, officers and crew, the owner to produce satisfactory evidence of such increases in wages or bonuses;

[fol. 4]

IX

That the United States Shipping Board did thereafter establish the rate of hire for each such steamship; that subsequent to August 1, 1917, there were proper increases in wages and bonuses over the standard prevailing August 1, 1917, and that claimant furnished to the United States Shipping Board satisfactory evidence thereof;

X

That subsequent to the said requisition of said vessels by defendant, the defendant having then in its possession many vessels and desiring to arrange for the management and operation thereof, entered into two certain contracts with the claimant; that in and by the terms of one of said contracts hereinafter referred to as the managing contract,

defendant acting by and through the United States Shipping Board Emergency Fleet Corporation, appointed the claimant as its agent for the husbanding and managing of certain vessels; and in and by the other of said contracts, hereinafter referred to as the operating contract, the defendant, acting by and through the United States Shipping Board Emergency Fleet Corporation, appointed the claimant as its agent for the operation of certain of said vessels; that in and by each of said operating contract and managing contract it was provided that the claimant should receive compensation in accordance with rates to be fixed from time to time by the United States Shipping Board; that in and by each of said managing contract and operating contract it was also provided that the claimant should among other things, hold, on behalf of the defendant, all moneys collected on its behalf; that the said United States Shipping Board would thereafter fix the compensation to be paid to the claimant pursuant to the terms of said managing agreement and said operating agreement;

XI

That up until the 18th day of October, A. D. 1926, the claimant has from time to time charged to the defendant upon its books the sums due from time to time from the [fol. 5] defendant as the agreed compensation for the use of said vessels, pursuant to the terms of said requisition charters, including the amounts due monthly to the claimant pursuant to the monthly rate fixed by the United States Shipping Board as aforesaid, and also including the sums paid by the claimant to the master, officers and crew of said vessels for proper increases in wages and bonuses over the said rate prevailing August 1, 1917; that the claimant has credited to the defendant upon its books all sums received by claimant as the revenue received by defendant while operating said vessels for the defendant; that the defendant has not paid to the claimant, and did not pay to the claimant until October 26, 1926, any of the sums due to the claimant from time to time by reason of services rendered to the defendant pursuant to said operating agreements, but that the claimant has, from time to time, charged to the defendant upon its books, sums falling due to the claimant by reason of the performance of said services; that all of

said credits and debits entered in the said books of the claimant were carried upon a single account, which said account constituted a mutual, current and running book account between the claimant and the defendant; that during the whole time that said vessels, or any of them, were in the possession of the defendant under said requisition, and during the whole of the time that said claimant was operating said vessels, or any of them, for the defendant, it has been understood between claimant and the defendant that said account constituted a current, mutual and running book account between them, and that the purpose of retaining said moneys received by the claimant was to credit the same against moneys due to the claimant from the defendant on said requisition charters and said commissions, and that when a final balance between the claimant and the defendant was agreed upon the said account would be settled; that the United States Shipping Board has never disputed, but has always confessed, that said account of moneys due to the United States on the one part, and of the said moneys due to the claimant from the United States on the other part, was for the purpose of the payment by one party to [fol. 6] the other of such balance as should be due when all moneys relating to such balance due should have been determined;

XII

That on the 5th day of June, 1920, an act of Congress entitled "Merchant Marine Act, 1920" (41 Stat. L. 988) was approved, and in and by which said act it was provided that the said Urgent-Deficiences Appropriation Act was repealed, subject, among others, to the following limitations:

(1) That all contracts or agreements lawfully entered into before the passage of the act should be acknowledged and carried out by the United States Shipping Board; and

(2) That all rights, interests or remedies accruing, or to accrue, as a result of any such contract or agreement, or of any action taken in pursuance of said act or parts of said act, should be in all respects as valid and enforced in like manner as if this act had not been passed; and

(3) That as soon as practicable after the passage of the act the United States Shipping Board should adjust, settle

and liquidate all matters arising out of, or incident to, the exercise by or through the President of any of the powers or duties imposed upon the President by any such act, or parts of acts; provided, that any person dissatisfied with any decision of the Board should have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under said Urgent-Deficiencies Appropriation Act;

XIII

That the last entry in said current, mutual and running book account between the parties hereto prior to October 18, 1926, is under date of December 20, 1922; that ever since the 15th day of July, 1921, the said United States Shipping Board, acting pursuant to the said last mentioned act of Congress, has been actively engaged in the adjusting, settlement and liquidation of said account between the claimant and the defendant; that pursuant to the said proceedings of the said United States Shipping Board to ad-[fol. 7] just, settle and liquidate said account with the claimant, and pursuant to negotiations for the adjustment, settlement and liquidation thereof between the claimant and the said United States Shipping Board, the said United States Shipping Board did, on the 18th day of October, 1926, finally adjust, settle and liquidate the balance due to said claimant upon said mutual, open and running book account, with the exception hereinafter described; and on said last named date it was agreed by and between the claimant and the said United States Shipping Board that there was due to the claimant from the defendant on said account, a balance of not less than one hundred thirty-four thousand seven hundred twenty-two and 67/100 dollars ($134,722.67); and that upon the payment of said sum of one hundred thirty-four thousand seven hundred twenty-two and 67/100 dollars ($134,722.67) by the defendant to the claimant, all of the items of said account would be fully paid and satisfied with the exception of that certain item hereinafter described; that on said 18th day of October, 1926, the said United States Shipping Board decided that, in fact, there was due to the claimant from the defendant on said last named date upon said account not more than the sum of one hundred thirty-four thousand seven hun-

dred twenty-two and 67/100 dollars ($134,722.67); and that the claimant is dissatisfied with said decision of the United States Shipping Board, in that there was due to the claimant from the defendant on said last named date upon said account the sum of one hundred eighty-four thousand ninety-five and 78/100 dollars ($184,095.78); that the difference between said sum of one hundred thirty-four thousand seven hundred twenty-two and 67/100 dollars ($134,722.67) so paid to the claimant as aforesaid and the amount due upon said account in the sum of one hundred eighty-four thousand ninety-five and 78/100 dollars ($184,095.78) represented the sums claimed by the claimant to be due to it from defendant pursuant to said provision contained in each of said requisition charters that the defendant would pay to the claimant as additional compensation for the use of said vessels, all sums paid by the claimant for any [fol. 8] proper increases in wages and bonuses over the standard prevailing August 1, 1917, for master, officers and crew; that during the period of time that said vessels were in use by the defendant under the terms of said requisition charters, the claimant paid to the master, officers and crew of said vessels sums for proper increases in wages over the standard prevailing August 1, 1917, in the total sum of forty-nine thousand three hundred seventy-three and 11/100 dollars ($49,373.11), no part of which said sum of forty-nine thousand three hundred seventy-three and 11/100 dollars ($49,373.11) has ever been paid to the claimant; that notwithstanding payment of said increases in wages and bonuses by the claimant the said United States Shipping Board has refused, and still does refuse, to include said sum in the said adjustment, settlement and liquidation of said account;

XIV

That pursuant to said adjustment, settlement and liquidation of said account by said United States Shipping Board the defendant, acting by and through the said United States Shipping Board, and the claimant did, on said 18th day of October, 1926, enter into a certain agreement in writing, a copy of which said agreement is hereunto annexed, marked Exhibit "C" and is hereby expressly referred to and made a part of this petition, in and by the terms of which said agreement said account was finally

adjusted, settled and liquidated in the following manner, that is to say: By the agreement of the parties that the sum of not less than one hundred thirty-four thousand seven hundred twenty-two and 67/100 dollars ($134,722.67) was still due to the claimant upon said account, which said sum was paid to the claimant concurrently with the execution of said agreement; and by the agreement of the parties that the claimant should retain any and all right to recover from the defendant the sum of forty-nine thousand three hundred seventy-three and 11/100 dollars ($49,373.11) paid by the claimant to the master, officers and crew of said vessels for increases in wages and bonuses over the stand-
[fol. 9] ard prevailing August 1, 1917, during the period said vessels were under said requisition charters;

XV

That neither the whole nor any part of said sum of forty-nine thousand three hundred seventy-three and 11/100 dollars ($49,373.11) has ever been paid to said claimant, but that there is still due from the defendant to the claimant said sum of forty-nine thousand three hundred seventy-three and 11/100 dollars ($49,373.11);

XVI

That the claimant is the sole owner of said claim hereinbefore described against the defendant and is the sole person interested therein; and that said claimant became the owner thereof by reason of the facts hereinbefore stated;

XVII

That no assignment of said claim, or any part thereof, or any interest therein, has ever been made by said claimant;

XVIII

That said claimant is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets;

XIX

That said claimant has at all times borne true allegiance to the government of the United States, and has not, at any time, in any way, voluntarily aided, abetted or given en-

couragement to rebellion against the government of the United States;

XX

That the claimant believes the fact hereinbefore stated to be true.

Wherefore the claimant prays for judgment against the defendant in said sum of forty-nine thousand three hundred [fol. 10] seventy-three and 11/100 dollars ($49,373.11), and for such other relief as may be just and proper in the premises.

Matson Navigation Company, by F. A. Bailey, Its Secretary. Brobeck, Phleger & Harrison, Attorneys for Claimant. Vogelsang, Brown, Cram and Feely, of Counsel for Claimant.

[fol. 11] *Duly sworn to by F. A. Bailey. Jurat omitted in printing.*

[fol. 12] EXHIBIT A TO PETITION

Contract Bureau, United States of America

Requisition Charter

This Requisition Charter, made and concluded upon in the District of Columbia the — day of ——, 1917, between —— ——, of ——; of ——, owner of the good American Screw Steamship ——, of ——, of — tons gross register and — tons net register, built in ——, having engines of — nominal horsepower, provided with proper certificate for hull and machinery, and classed —— at —— of about — cubic feet capacity and — tons dead-weight capacity, summer freeboard, inclusive of permanent bunkers, capable of making an average voyage speed when loaded of — knots an hour, under ordinary conditions, on a consumption of about — tons of coal, or about — barrels of oil per 24 hours; and the United States of America, through the United States Shipping Board,

Witnesseth:

Whereas, By Requisition Order, dated —— ——, 1917, pursuant to the Urgent Deficiency Act 15 June, 1917, and

the President's Executive Order 11 July, 1917, the United States has requisitioned the use of the steamship ——, and the steamship has been delivered into possession of the United States pursuant to the Requisition; and

Whereas, it is desired by the United States and by the owner to fix the compensation (hereinafter called hire) which the United States shall pay to the owner for use of the steamship so requisitioned, and to define by agreement the rights and duties of the United States and of the owner with respect to the operation of the vessel under the Requisi- [fol. 13] tion, and with respect to other matters in connection therewith;

Now, therefore, it is agreed as follows:

First. The terms and conditions under which the vessel is to be operated shall be those contained in the "Time Form" hereto annexed; provided, however, that at the time of the Requisition or at any time thereafter, on five days' written notice, the United States may operate the vessel under the terms and conditions contained in the "Bare Boat Form" hereto annexed, such operation to begin when the steamship is in a United States port.

Second. In consideration of the compensation provided and the other obligations assumed by the United States hereunder, the owner accepts this Requisition Charter in full satisfaction of any and all claims he has or may have against the United States arising out of the Requisition and accepts the compensation herein provided for as the just compensation required by law; provided, however, that the acceptance of this Requisition Charter shall be without prejudice to the claim, if any, the owner may have against the United States arising out of recoveries against the owner by third parties on the vessel's commitments.

Third. Upon giving five days' written notice to the owner the United States may at any time, when the vessel is in a United States port, cancel this Requisition Charter without prejudice to the accrued rights of either party.

——— ———, Owner, by ——— ———. The United States Shipping Board, by ——— ———.

Witness to the signature of ——— ———: ——— ———.
Witness to the signature of ——— ———: ——— ———.

[fol. 14] EXHIBIT B TO PETITION

Time Form

Whereas, the United States has determined to deliver possession of the vessel to the owner to be operated by the owner for the United States;

Now, therefore, it is agreed as follows:

Period of Service. Vessel to be Completely Equipped and Fit. Making Good Defects, Operation of Vessel, Wages, etc.

First. The steamship shall remain in the service of United States under the Requisition Order to be employed as and where the United States may from time to time determine and for such period of time as the United States may determine, but such period shall not extend beyond the first arrival of the steamship in an American port six months after peace is declared unless she shall be required for Government purposes. The vessel, when placed at the disposal of the United States, as directed by it, shall be or shall forthwith be made by and at the expense of the owner, tight, staunch, strong, and well and sufficiently tackled, appareled, furnished, outfitted, and equipped, and in every respect seaworthy and in good running order and condition; and shall be fit for the service in which she has usually been employed, having on her delivery United States inspection certificate that she has met all requirements to fit her for the trade in which she is employed at the time of the Requisition, except that no such certificate shall be required if she be a foreign-built vessel not at present subject to the United States Steamboat Inspection laws as provided in the Panama Canal act, as amended 18 August, 1914; and having a full complement, including the master, officers, and crew, for a vessel of her tonnage. Any deficiency in these respects must be remedied forthwith by and at the expense of the owner; and any time lost in remedying any such deficiency is not to be paid for by the United States.

Special Equipment. Complement of Vessel

Second. The owner shall operate the vessel for the United States, shall provide and pay for all provisions, wages,

bonuses, and consular shipping and discharging fees of the master, officers, and crew, and shall provide and pay for all cabin, deck, engine room, and other necessary stores, and [fol. 15] shall maintain the steamship in a thoroughly efficient state in hull and machinery, tackle, apparel, furniture, and equipment during the service. If the service requires any special equipment in addition to that required for the vessel's previous usual service, such equipment shall be provided and paid for by the United States. The ordinary crew as required by law to operate the vessel overseas and in trans-Atlantic service shall be considered a full complement, and any extra men, such as wireless operators, armed guards or others, not required by law for ordinary merchant overseas and trans-Atlantic service, shall be paid for by the United States. The owner shall, however, provide proper subsistence for such extra men at reasonable rates to be fixed by the United States.

Status of Vessel

Third. The vessel, while being so operated by the owner, shall not have the status of a Public Ship, and shall be subject to all laws and regulations governing merchant vessels, and the owner shall take all proper steps to prevent any suit or process from interfering with her service.

When a Public Ship

When, however, the requisitioned vessel is engaged in the service of the War or Navy Department, the vessel shall have the status of a Public Ship, and although the owner shall continue to provide and pay for all the items stated to be provided and paid for by the owner while operating the vessel as provided in clause "Second", the master, officers, and crew shall become the immediate employees and agents of the United States, with all the rights and duties of such, the vessel passing completely into the possession and the master, officers, and crew absolutely under the control of the United States. The owner, master, officers, and crew shall be notified of the commencement and termination of the vessel's employment in the service of the War or Navy Department, and a proper notation shall be made on the ship's Articles prior to the signing thereof, showing that the master, officers and

crew have entered into the service of the United States. Monthly, or as soon as possible after the termination in a United States port of any voyage in the service of the [fol. 16] War or Navy Department, the owner shall furnish the United States as a voucher a statement by the United States Shipping Commissioner which shall certify the dates and amounts of the payment of the wages and bonuses of the master, officers, and crew as the same appear on the completed Articles.

Nationality of Crew

Fourth. So far as practicable, every member of the crew shall be an American citizen, citizens and subjects of enemy or ally of enemy nations always excluded. Full list of crew, with their ratings and nationalities, shall, if required, be produced to the United States at the time of delivery of the vessel or on the entry into the pay of the vessel of such member or members of the crew.

United States Will Provide Fuel, etc.

Fifth. The United States shall provide and pay for all coals or other fuel, fresh water, port charges, pilotages, agencies, commissions, brokerage, wharfage, and consular charges (except those pertaining to the master, officers, and such part of the crew as the owner is responsible for under clause "Second"), and all other usual expenses paid by charterer under so-called "Government Form Time Charter," except as otherwise provided. The United States shall reimburse the owner for all income or excess profits taxes in foreign countries upon income or profits derived from the vessel and accruing to the United States.

Dunnage

Sixth. The United States shall provide the necessary dunnage and shifting boards, but the owner shall allow the United States the use of dunnage and shifting boards already on board the steamship, the United States to have the privilege of using the shifting boards for dunnage, but making good any damage thereto.

Fuel on Delivery and Redelivery

Seventh. The United States shall accept and pay for all fuel on board at the time of delivery under the Requisition Order, and the owner shall on the re-delivery of the steamship pay for all fuel left on board, at the current market price at the respective ports of delivery and re-delivery. A statement of such fuel shall be furnished forthwith by the owner to the United States for verification.

Payment of Hire

Eighth. The United States shall pay for the use of the steamship at the monthly rate which shall from time to [fol. 17] time be established by the United States Shipping Board for a vessel of her description, commencing on and from the hour that she shall be ready for delivery under the Requisition (and is so reported to the United States) and at and after the same rate for any part of a month, hire to continue until the hour at which the vessel may be ready for re-delivery at a United States port (and is so reported to the owner).

If the United States Shipping Board shall hereafter lower the rate of hire from that in effect on the date of the Requisition, the owner shall have the option of canceling this Requisition Charter as of the date of such reduction, without prejudice to the rights of either party.

Payment of hire shall be made in the District of Columbia, in cash, monthly, as earned, at the end of each calendar month. If the vessel is lost, hire shall be paid up to and including the date of her loss (if the time of her loss be uncertain, then up to and including the date she is last heard from).

Dead-weight Tonnage

Dead-weight tonnage shall be based on summer freeboard assigned or to be assigned with reference to North Atlantic service, according to the standards of any recognized classification society; proper evidence of such assignment, together with a true copy of the dead-weight scale of the vessel, shall, if possible, be furnished by the owner. Until reasonable opportunity had been afforded the owner to procure such assignment, hire shall be paid on dead-

weight tonnage as certified by the owner; any excess or deficiency in such hire to be adjusted upon subsequent determination of summer freeboard.

Classification

Ninth. A certified statement from a recognized classification society that the vessel has been classed as fit for her previous usual service shall, if obtainable at a reasonable cost, be furnished by the owner. Any alterations which are made to obtain a class for North Atlantic service which are not required to obtain a class for the vessel's previous usual service shall be made by and at the expense of the United States, but there shall be no deduction from the hire for time consumed in making such alterations. So [fol. 18] far as the exigencies of the service will permit, the owner shall do all things necessary to maintain the vessel's class.

Increase in Crew's Wages and Bonuses

Tenth. In addition to the aforesaid compensation for use of the steamship, the United States agrees to reimburse the owner for any proper increases in wages and bonuses over the standard prevailing 1 August, 1917, for master, officers, and crew, the owner to produce satisfactory evidence of such increases in wages or bonuses.

Inventory of Outfit

Eleventh. The United States shall have the use of all outfit, equipment, and appliances without extra cost, and the same or their substantial equivalent shall be returned to the owner when the vessel is re-delivered in the same or as good order and condition as when received, ordinary wear and tear and damage due to the operation of risks assumed by the owner excepted. An inventory shall be furnished forthwith by the owner to the United States for verification.

Insurance of Vessel

Twelfth. The owner shall assume the marine risks, including collision liabilities (excepting losses and liabilities arising from war risks). The United States shall assume war risks (including collision liabilities), as excluded by

the following clause in the American Hull Policy, 1916 Form: "Waranted free of capture, seizure, arrest, restraint, or detainment, or the consequences thereof, or of any attempt thereat (piracy excepted), and also from all consequences of hostilities or warlike operations, whether before or after the declaration of war."

When, however, the requisitioned vessel is used upon voyages different from those from which she has been taken and for which she was intended, and by reason thereof the owner is compelled to pay an excessive premium in the new service in which she is engaged as compared with other vessels in such service of approximately the same age, class, and value, the facts may be shown to the United States Shipping Board, and if the facts are so found, the United States will pay the excess premium, based upon value not in excess of that on which the vessel has heretofore usually been insured. The value [fol. 19] thus insured shall not be deemed in any way indicative of the just compensation to be paid in case of loss or damage due to the operation of risks assumed by the United States.

The United States also shall pay additional premium (based upon value not in excess of that on which the vessel has heretofore usually been insured) required for voyages outside the following warranties:

a. Warranted not to enter or sail from any port or ports, place or places in British North America on the Atlantic coast, except Halifax, Louisburg, and Sydney, for purpose of coaling, arming, and compulsory examination by the British Government, and not north of 50° north latitude on the Pacific coast.

b. Warranted not to enter the Baltic beyond 13° east longitude, or sail from a loading port therein between October 1 and April 1.

c. Warranted not to sail for or from any part or place on the north east of Europe between North Cape and Cape Kanin, and not to proceed east of Cape Kanin in the Arctic Ocean.

d. Warranted not to sail with Indian coal as cargo between March 1 and June 30.

e. Warranted not to sail for or from any port or place in the Bering Sea or Alaska or Siberia (except that vessels may enter or sail from Vladivostok between May 1 and November 1).

And if the vessel be seaworthy at the time of her delivery under the Requisition and at the commencement of the voyage from the United States, but subsequently becomes unseaworthy so as to constitute a breach of marine insurance warranty of seaworthiness, and such unseaworthiness be not due to or permitted to continue by the neglect or misconduct of the owner or his agents, and loss or damage ensues which is proximately occasioned by such unseaworthiness, the United States will assume such marine loss, in case the same shall be uncollectible, the extent of which shall be ascertained as of the date of such loss [fol. 20] or damage. The United States Shipping Board shall have the right to determine finally any question of fact arising under this paragraph.

Upon giving five days' written notice the United States may elect to assume all marine risks, including collision liabilities.

In the event and to the extent that the owner shall not be able to secure marine insurance from established insurance companies, at rates considered reasonable by the United States Shipping Board, the United States shall assume the marine risks, including collision liabilities, until such time as the owner shall be able to secure such insurance.

Whenever the United States assumes the marine risks, including collision liabilities, or any part thereof, a deduction which in the opinion of the United States Shipping Board represents a proper premium charge shall be made from the monthly rate of hire.

If the vessel shall be lost in a service where she may have been exposed to both war and marine risks, in the event of there being no evidence as to whether loss is due to marine or war risk, it shall be presumed to be due to war risk.

The owner shall insure against the usual protection and indemnity risks for the full protection of the owner and the United States, the expense thereof to be borne 50 per cent by the owner and 50 per cent by the United States.

Insurance of Crews

Thirteenth. Except when the vessel becomes a Public Ship, as provided in clause "Third", the owner must provide and pay for all insurance on the master, officers, and crew, as required by law; provided, however, that the United States shall reimburse the owner for all war-risk insurance, required by law, on the master, officers, and crew.

Compensation in Event of Loss or Damage. Option to Substitute Vessels.

Fourteenth. In case of loss or damage due to the operation of a risk assumed by the United States just compensasation for such loss or damage, with interest at 6 per cent [fol. 21] per annum, commencing 30 days after proof of such loss or damage, shall be paid by the United States in the District of Columbia, interest not to be paid, however, if the owner resorts to any court for the purpose of establishing the amount of the just compensation. The United States, shall, however, have the option (to be exercised with in 90 days after the date of loss or constructive loss as provided in clause "Fifteenth"), of delivering to the owner within a year after the loss, in lieu of such payment, a vessel of substantially similar tonnage, type, class, and value and of substantially no greater age (any deficiency in value to be paid for in cash), paying interest in the meanwhile from the date of loss at the rate of 6 per cent per annum on the value of the lost vessel.

Constructive Total Loss

Fifteenth. If the steamship sustains serious damage or other injury arising from the operation of a risk assumed by the United States, to such extent that the United States shall, without regard to any rule of law, consider her a total loss, the United States shall have the option (to be exercised within 90 days thereafter) of declaring the steamship to be a total loss as of the date of the damage, and of taking over or selling her, and the owner's rights as to compensation shall be the same as provided in clause "Fourteenth", interest to commence 30 days after proof of the damage.

Space and Accommodations

Sixteenth. The whole reach of the vessel's holds, decks, and other places of loading and accommodations (not to be loaded beyond what she can reasonably stow and carry) shall be at the disposal of the United States, reserving only proper and sufficient space for ship's officers, crew, tackle, apparel, furniture, provisions, stores, and fuel.

Duties of Master

Seventeenth. The master shall prosecute his voyages with the utmost dispatch, shall render all customary assistance with ship's crew and boats, and use all diligence in caring for ventilation of the cargo. The master shall be under the orders and directions of the United States or its nominees as regards employment or agency. The United States shall load, stow, and trim the cargo at its own [fol. 22] expense and risk under the supervision of the master, who is to have bills of lading for cargoes signed as presented, without prejudice to any term or provision of this contract, and the United States hereby agrees to indemnify the owner from all consequences or liabilities that may arise from the master's signing bills of lading or otherwise complying with the orders and directions of the United States.

Responsibility for Navigation

Eighteenth. The master shall obey all orders and instructions which he may receive from the United States or from any of its nominees, and shall in all respects comply with any confidential instructions for masters which may be issued by the United States, but he shall be the agent of the owner in all matters respecting the management, handling, and navigation of the vessel, except when the vessel becomes a Public Ship or is otherwise subject to the immediate orders of the United States in respect to such matters.

Sailing Directions

Nineteenth. The United States shall furnish the master from time to time with all requisite instructions and sailing directions, and he shall keep a full and complete log

of each voyage, which is to be patent to the United States at any time.

Complaints

Twentieth. If the United States shall have reason to be dissatisfied with the conduct of the master, officers, or any member of the crew, the owner shall, on receiving particulars of complaint, investigate the same, and if necessary make a change in the appointments. In case of an emergency not permitting of such complaint and investigation, the United States shall have power to remove the master, offcers, or any member of the crew and to appoint others in their places, but if possible the owner shall be consulted in the making of such appointments.

Supercargo

Twenty-first. The United States may appoint a representative to accompany the steamship, who shall be furnished, free of charge, with first-class accommodations, if space permits, and the same fare as provided at the captain's table.

[fol. 23]

Lapse of Hire

Twenty-second. In the event of loss of time from deficiency of men or stores, breakdown of machinery, stranding, collision, dry-docking for the purpose of examining or painting underwater parts or making any repairs, or from any other cause preventing the working of the vessel for more than 24 consecutive hours, the hire shall be reduced one-half until the vessel be again in an efficient state to resume her service; provided, however, that in case of loss of time in a port in the war zone, or at sea, due to any such cause, no such reduction shall be made if the owner shall show that he used due diligence to avoid such loss of time. Provided further, that there shall be no reduction of hire on account of loss of time arising from a war risk. Should the vessel be driven into port or anchorage by stress of weather, or from any accident to cargo, detention or loss of time occasioned thereby shall not be the cause for any cessation or reduction of hire. In any case of loss of time for which no reduction of hire is made, credit shall be given to the United States for any expenses saved by the owner during such time.

Dry-docking

Twenty-third. The steamship shall be dry-docked and her bottom cleaned and painted in the United States whenever the United States and the master think necessary, but at least once in each eight months, provided the exigency permits.

Limitation of Liability

Twenty-fourth. Throughout the period of service under this "Time Form" losses or damages arising or occasioned by the following causes shall be always excepted, viz., the act of God, perils of the seas, fire on board, in hull, craft, or on shore, barratry of the master or crew, enemies, pirates, robbers or thieves, arrests and restraints of princes, rulers, and peoples, collisions and strandings, explosions, bursting of boilers, breakage of shafts, or any latent defect (even if existing at the beginning of the voyage) but not discoverable by due diligence, in the hull, boilers, machinery, or appurtenances, negligence, default, or error in judgment of the pilot, master, or crew, or other servants of the owner, in the management or navigation of the steamship.

[fol. 24] This "Time Form" is subject to all the terms and provisions of and any or all the exemptions from liability contained in the act of Congress approved 13 February, 1893.

Gear Lights

Twenty-fifth. The owner shall provide gear for all ship's derricks, and shall maintain the gear of the vessel as fitted. The owner shall provide oil and lanterns for night work or vessel shall give use of electric lights when fitted therewith. The owner shall provide ropes, falls, slings, and blocks necessary to handle ordinary cargo up to 3 tons in weight, but at the expense of the United States.

Day and Night Work. Overtime

Twenty-sixth. The vessel shall work day and night, as required, and the steam winches shall be at the service of the United States by day and night, with full steam; whenever possible without additional expense to the owner, same to be worked free of cost by the crew. The United

States shall reimburse the owner for all overtime, provided the same be certified by the agent or nominee of the United States; or, if no agent is present, by the master, at such standard rates as may be in force from time to time.

Alterations and Vessel's Condition on Redelivery

Twenty-seventh. The United States may at any time remove or alter, at its expense, all or any of the fittings of the vessel, and may erect any new fitting which may be required to render the vessel available for service to the United States, provided that she shall, at the cost of the United States, be redelivered to the owner in the same or as good order and condition as that in which she was when delivered to the United States, ordinary wear and tear and damage due to the operation of risks assumed by the owner excepted, or just compensation for the damage thus occasioned to the vessel, with interest at 6 per centum per annum commencing 30 days after the proof of such damage upon redelivery of the vessel, shall be paid by the United States, in the District of Columbia, interest not to be paid, however, if the owner resorts to any court for the purpose of establishing the amount of just compensation.

[fol. 25]

Salvage

Twenty-eighth. All derelicts and salvage shall be for the equal benefit of the United States and the owner, after deducting all expenses incident thereto and the proportion due to the master, officers and crew.

General average

Twenty-ninth. General average, if incurred, shall be settled at New York according to York-Antwerp Rules of 1890 and Antwerp Rule of 1903, and as to matters not covered thereby according to the customs and practice of the port of New York.

Liens

Thirtieth. The United States shall have a lien on the vessel for all moneys paid and not earned or due to the owner and for all advances and overpayments made, and the United States shall have a lien on all cargoes and goods

for the payment of freights and charges, including dead freight, demurrage, forwarding charges, charges for carriage to port of shipment, and for general average claims.

Thirty-first. No Member of or Delegate to Congress, or Resident Commissioner, nor any person employed by the United States Shipping Board is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom, but under provisions of section 116 of the act of Congress approved 4 March, 1909, this stipulation, so far as it relates to Members of or Delegates to Congress, or Resident Commissioners, shall not extend or be construed to extend to any contract made with an incorporated company for its general benefit.

Arbitration

Thirty-second. Any dispute of law or fact arising under this "Time Form", except as to the rate of hire and the compensation for actual or constructive total loss of the vessel, and except as to matters expressly left to be decided by the United States Shipping Board, shall be referred to the arbitration of three persons, one appointed by the owner, one by the United States, and the third by the two so chosen. They may proceed in any manner determined by themselves, and their decision, or that of any two of them, shall be final, and for the purpose of enforcing any award hereunder the agreement may be made a rule of court. [fol. 26] Such arbitration shall be a condition precedent to the commencement of any action.

Special Clauses—Passenger Ships

Thirty-third. The owner of a passenger vessel shall permit the use, without extra cost therefor, of all cooking utensils and facilities already aboard the vessel, provided the same or their substantial equivalent be re-delivered to the owner in the same or as good order and condition as when received, ordinary wear and tear and damage due to the operation of risks assumed by the owner excepted. An inventory of such property shall be furnished forthwith by the owner to the United States for verification.

Thirty-fourth. The owner of a passenger vessel, if requested by the United States, whenever passengers are on

board the vessel, shall operate and maintain the saloon mess, for which the owner shall be compensated at reasonable rates to be fixed by the United States.

Thirty-fifth. The owner of a passenger vessel, if requested by the United States, shall operate and maintain a troop mess, in which the meals served shall be the equivalent of the authorized United States Army garrison ration, and for which the owner shall be compensated at reasonable rates to be fixed by the United States.

Thirty-sixth. Whenever passengers are carried (troops or others) the United States shall receive all the earnings therefrom, and pay all expenses incidental thereto which are not assumed by the owner under the other provisions of this "Time Form", including repairs and upkeep of fittings (subject to ordinary wear and tear but not breakage) and shall also furnish any additions it may require; or, in the alternative, shall make a special arrangement with the owner on a per head basis.

Special Clauses—Tankers

Tanks to be Oil Tight

Thirty-seventh. The owner guarantees that the tanks are oil tight at the time of delivery and shall take every pre-[fol. 27] caution to maintain them in this condition during the service, but shall not be responsible for leakage.

Thirty-eighth. The owner shall facilitate the discharge of oil fuel to such ships as the United States shall direct, and shall provide a Y piece with necessary reducers for each discharge up to the maximum number which can be used simultaneously.

[fol. 28] EXHIBIT C TO PETITION

Agreement made this 18th day of October, 1926, between the United States of America, hereinafter called Party of the First Part, represented by the United States Shipping Board, acting by and through the United States Shipping Board Emergency Fleet Corporation, a District of Columbia corporation, and Matson Navigation Company, a Cali-

fornia corporation, hereinafter called Party of the Second Part.

Witnesseth:

Whereas, on or about October 12th, 1927, the Party of the First Part requisitioned the steamers Enterprise, Hyades, Lurline, Manoa, Matsonia, Maui and Wilhelmina, from the Party of the Second Part, under date of December 29, 1917, the Party of the First Part and the Party of the Second Part, executed agreements covering such steamers hereinafter referred to as "Requisition Charters"; and

Whereas, each of the aforesaid Requisition Charters has terminated, and the steamers Enterprise, Hyades, Lurline, Manoa, Matsonia, Maui and Wilhelmina have been redelivered to the Party of the Second Part, and

Whereas, during the years 1917, 1918, 1919, 1920, 1921 and 1922, the Party of the Second Part managed and/or operated various vessels for the Party of the First Part, pursuant to written agreements entered into with the United States Shipping Board Emergency Fleet Corporation, Agent of the Party of the First Part, said agreements being known as "M-1", "O-1", "M-2", "O-2" and "MO-4", and

Whereas, it is the desire and intention of the parties hereto to settle and determine all matters, claims, controversies, disputes and differences arising or growing out of or in connection with the Requisitioning of said vessels, said Requisition Charters, and said agreements for the management and/or operation of vessels, except as hereinafter provided, and

Whereas, the United States Shipping Board by resolution adopted June 2, 1926, authorized settlement between the parties in the manner hereinafter set forth:

[fol. 29] Now, therefore, in consideration of the premises and of the payment by the United States Shipping Board Emergency Fleet Corporation, as Agent of the Party of the First Part, to the Party of the Second Part of the sum of One Hundred Thirty-Four Thousand Seven Hundred Twenty-Two Dollars and Sixty-Seven Cents ($134,722.67), the receipt whereof is hereby acknowledged by the Party of the Second Part, the parties hereto agree as follows:

1. The Party of the First Part does hereby covenant and agree to remise, release and forever discharge and by these

presents does for itself and its assigns, remise, release and forever discharge the Party of the Second Part, its successors and assigns, of and from all manner of controversies, claims, actions, demands, suits, damages, judgments, executions, recoveries, costs and expenses whatsoever, in law, equity and/or admiralty which against the said Party of the Second Part, its successors and assigns, it, the said Party of the First Part ever had, now has or which it or its assigns, hereafter can, shall or may have upon or by reason of any matter, cause or thing whatsoever, in any manner arising out of or in connection with the requisitioning the aforesaid vessels, said Requisition Charters and the said agreements known as "M-1", "O-1", "M-2", "O-2" and "MO-4" for the management and/or operation of vessels, except as hereinafter provided.

2. The Party of the Second Part does hereby covenant and agree to remise, release and forever discharge and by these protests does for itself and its successors and assigns remise, release and forever discharge the Party of the First Part, the United States Shipping Board and the United States Shipping Board Emergency Fleet Corporation and the successors and assigns of any thereof, of and from all manner of controversies, claims actions, demands, suits, damages, judgments, executions, recoveries, costs and expenses whatsoever, in law, equity and/or admiralty which against the said Party of the First Part, the United States Shipping Board and the United States Shipping Board Emergency Fleet Corporation and each of them, and the successors and assigns of any thereof, it, the Party [fol. 30] of the Second Part ever had, now has or which it or its successors and assigns hereafter can, shall or may have upon or by reason of any matter, cause or thing whatsoever, in any manner arising out of or in connection with the Requisitioning of said vessels, said Requisition Charters and said agreements known as "M-1", "O-1", "M-2", "O-2" and "MO-4", for the management and/or operation of vessels, except as hereinafter provided.

3. There is expressly excepted from the provisions of this agreement and release, and reserved to each Party hereto, any and all claims or demands either party hereto

may now have or hereafter have against the other and the successors and assigns of any thereof, arising or in any manner growing out of or in connection with additional wages and bonuses, totalling Forty-Nine Thousand Three Hundred Seventy-Three Dollars and Eleven Cents ($49,373.11), alleged to have been paid by the Party of the Second Part to the officers and crews of the steamers Enterprise, Hyades, Lurline, Manoa, Matsonia, Maui and Wilhelmina, during the periods said vessels were under said Requisition Charters.

It is expressly understood and agreed that the United States of America caused this release to be executed and delivered in reliance upon the truth and completeness of all statements, representations and claims of the said Party of the Second Part and of the attached affidavits of its Treasurer sworn to November 2nd, 1926.

[fol. 31] In witness whereof the parties hereto have caused these presents to be executed in triplicate on the day and year first above written.

United States of America, by United States Shipping Board, by United States Shipping Board Emergency Fleet Corporation, by (Signed) J. Harry Philbin, Vice-President. Matson Navigation Company, by (Signed) W. P. Roth, Vice-President.

Attest: (Signed) Samuel Goodacre, Secretary.
Attest: (Signed) F. A. Bailey, Secretary.

Approved as to Form:
(Signed) Harry Lovy, Assistant General Counsel.
(Signed) C. G. Pacbe, Assistant General Counsel.

[fol. 32] District of Columbia, ss:

Before the subscriber, a Notary Public in and for said District of Columbia, personally came J. Harry Philbin and Samuel Goodacre, whose names, as Vice-President and Secretary, respectively, of the United States Shipping Board Emergency Fleet Corporation, a District of Columbia corporation, are signed to the foregoing instrument and who are to me well known and known to me to be the Vice-

President and Secretary, respectively, of said corporation and acknowledged to me that as such Vice-President and Secretary, respectively, and in the name of said corporation, and as its act and deed and by its authority, they executed said instrument, voluntarily, for and as the act of said corporation in its representative capacity for and as the act of the United States of America; and caused to be thereto affixed the true corporate seal of said corporation.

In witness whereof I have hereunto set my hand and affixed my official seal on this 19th day of November, 1926.

(Signed) Maurice J. Pierce, Notary Public

STATE OF CALIFORNIA,
City and County of San Francisco, ss:

On the 2nd day of November, in the year 1926, before me personally came W. P. Roth, to me known, who, being duly sworn, did depose and say that he resides in San Francisco, California, that he is the Vice-President of the Matson Navigation Company, the corporation described in and which executed the above instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

(Signed) Katherine Hallahan, Notary Public. My commission expires January 28, 1930.

[fol. 33] STATE OF CALIFORNIA,
City and County of San Francisco, ss:

A. M. McCarty being duly sworn, deposes and says that he is Treasurer of Matson Navigation Company, and resides at 235-14th Ave., in the City of San Francisco, that he was Treasurer of Matson Navigation Company, between the dates 1917 and 1922, both inc., and as such became familiar with its accounts and books covering the operation of vessels under the Requisition Charters referred to in the annexed agreement and operation and management of vessels of the United States Shipping Board and/or United States Shipping Board Emergency Fleet Corporation, managed and/or operated by it under agreements in writing known as "M-1", "O-1", "M-2", "O-2" and "MO-4" during the years 1917, 1918, 1919, 1920, 1921 and 1922

that the entries in said accounts and books concerning such operations and management are true, full and complete, and that the same truly represent and reflect the transactions involved in such operations and management; that all statements, representations and claims of the said Matson Navigation Company, whether based upon such accounts and books, or otherwise, are true, full and complete. This affidavit is made for the purpose of inducing the United States of America, represented by the United States Shipping Board, acting by and through the United States Shipping Board Emergency Fleet Corporation, to make a certain settlement with said Matson Navigation Company, involving a release of the said Matson Navigation Company by the United States of America as provided in the annexed agreement dated the 18th day of October, 1926.

(Signed) A. M. McCarty.

Subscribed and sworn to before me this 20th day of November, 1926. (Signed) Katherine Hallahan, Notary Public.

[fol. 34] II. DEFENDANT'S MOTION TO DISMISS FOR WANT OF JURISDICTION—Filed by Leave of Court January 13, 1930

Comes the defendant, by its Assistant Attorney General, and respectfully moves the Court to dismiss this cause of action for the reason that this Court is without jurisdiction to hear and determine the same.

Respectfully submitted.

Charles P. Sisson, Assistant Attorney General. Dan M. Jackson, Attorney.

III. ARGUMENT AND SUBMISSION OF MOTION TO DISMISS

On December 8, 1930, the defendant's motion to dismiss for want of jurisdiction was argued and submitted by Mr. Frederick R. Conway, for the defendant, and by Mr. Gregory A. Harrison, for the plaintiff.

IV. History of Proceedings

On April 6, 1931, the court allowed the defendant's mo
tion to dismiss and dismissed the petition, with an opinio
by Whaley, J.

On May 11, 1931, the Court entered the following orde

Order

It is ordered this 11th day of May, 1931, on the court
own motion that the opinion filed in this case April 6, 193
be and the same is withdrawn, and a special finding of fa
with opinion sustaining defendant's motion to dismiss an
dismissing the petition is this day filed.

By the Cour

[fol. 35]

V. Special Finding of Fact and Opinion of the Court b Whaley, J., Sustaining Defendant's Motion to Dismiss- Filed May 11, 1931

Mr. Gregory A. Harrison for the plaintiff. Brobec
Phleger & Harrison, and Vogelsang, Brown, Cram & Feel
were on the briefs.

Mr. Frederick R. Conway, with whom was Mr. Assistan
Attorney General Charles B. Rugg, for the defendan
Messrs. Dan M. Jackson and Chauncey G. Parker were o
the brief.

This case having been heard by the Court of Claims, th
court, upon the evidence, makes the following

Special Finding of Fact

The petition was filed in the Court of Claims on April
1927. On April 7, 1927, the plaintiff filed in the Distri
Court of the United States for the Northern District o
California (Southern Division) seven separate suits agains
the United States on the seven separate requisition charter
pleaded in the petition filed in this court and known on th
docket of the said District Court as Nos. 17711, 17712, 1771
17714, 17715, 17716, and 17717. These suits were for variou
amounts alleged to have been paid to the masters, officer

and crews of the vessels requisitioned by the defendant. In three of the suits the amounts have been reduced from the amounts sued for in the Court of Claims in order to bring the suits within the jurisdiction of the District Court. These suits are now pending in the District Court.

Motion to Dismiss

The defendant moves to dismiss the petition on the ground that the Court of Claims has no jurisdiction to hear the case.

Opinion

WHALEY, Judge, delivered the opinion of the court:

This suit is brought in this court for the recovery of increased wages and bonuses paid to the masters, officers, and crews of seven vessels under requisition time charters entered into between the plaintiff and the United States Shipping Board, acting as agent for the President of the United [fol. 36] States.

The petition alleges the seven vessels were requisitioned under the authority of the act of June 15, 1917 (40 Stat. 182, C. 29), which authorized and empowered the President of the United States to requisition any vessel constructed, or in the course of construction, and to make just compensation therefor. The act further provided that the powers granted the President might be exercised through such agency or agencies as the President should determine. Pursuant to the authority conferred upon him by this statute the President promulgated on July 11, 1917, an Executive Order directing the United States Shipping Board to Exercise the powers thereby granted him.

On October 13, 1917, the President, acting through the United States Shipping Board, issued an order requisitioning on October 17, 1917, all of certain classes of American cargo ships. By the requisition order the owners were directed to continue to operate the ships in their regular trades for the account of the Government. In December following the plaintiff and the United States Shipping Board, acting as the agent of the President, agreed upon the just rate of hire to be paid and entered into seven separate requisition charters, covering the seven separate vessels. These requisition charters fixed the hire rate under a "Time form."

These seven requisitioned vessels were returned to th plaintiff during the year 1919. Settlement has been mad by the United States Shipping Board, acting as the agen of the Government, for all accounts except the alleged clai for increase in wages and bonuses. The settlement agree ment entered into on October 18, 1926, contained a reserva tion of the right to sue for the increase in wages and bonuse paid to the masters, officers, and crews of the vessels.

The plaintiff filed its petition in this court on April 1927, for the recovery of $49,373.11. On April 7, 1927, th plaintiff filed in the District Court of the United States fo the Northern District of California (Southern Division seven separate suits based on the seven separate requisitio charters mentioned and pleaded in the petition filed in thi court, the sums sued for in each suit being the amounts pai as wages and bonuses to the master, officers, and crew o each of the seven requisitioned vessels. The combine amounts do not aggregate the same amount as sued for i this court. In three of the cases the amounts have bee reduced to ten thousand dollars in order to come within th jurisdiction of the district court. These seven suits are nov pending in the district court.

The defendant, among other defenses, contends the Cour of Claims has no jurisdiction to hear the case under sectio 260, U. S. Code annotated, title 28, being Judicial Code, sec 154, which provides as follows:

"No person shall file or prosecute in the Court of Claims or in the Supreme Court on appeal therefrom, any claim fo or in respect to which he or any assignee of his has pend ing in any other court any suit or process against any perso who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or pro fessing to act, mediately or immediately, under the authorit of the United States."

This statute was adopted by Congress in the year 186 and the purpose of the act was to prevent a suit in the Court [fol. 37] of Claims when a suit is filed in a district or circuit court on the same cause of action. At that time no suit could be brought against the United States in any Federal district or circuit court, but suits could be commenced in those courts against a person "acting or professing to act, mediately or immediately under the authority of the United States," such

as the Secretary of the Treasury, a collector of customs, or one claiming to act as agent for the United States. The Court of Claims alone had jurisdiction where the United States was defendant. In 1887 Congress gave concurrent jurisdiction with the Court of Claims to the district court in claims against the United States up to a thousand dollars and to the circuit court when the amount did not exceed ten thousand dollars, 24 Stat. 505. Subsequently, the district court was given concurrent jurisdiction up to ten thousand dollars, 36 Stat. 1093.

The whole object and intent of the act of 1868 were to prevent the Government from being sued in separate jurisdictions on the same cause of action and to make the plaintiff elect in which court to sue. The act not only prohibits the filing but also the prosecution of any claim in the Court of Claims when another suit on the same cause of action is pending in another court. The seven suits in the District Court of California were filed one day after the suit was filed in this court, but the plaintiff is now attempting to prosecute the suit in this court while the suits in the district court are pending. This is prohibited under the statute. Corona Coal Company v. The United States, 263 U. S. 537.

If the Court of Claims is deprived of jurisdiction when a suit is filed on the same cause of action in another court against any person who, at the time the cause of action arose, was acting or claiming to act under the authority of the United States, a fortiori, would it be true where the suit was brought against the United States on the same cause of action in another court and also in the Court of Claims. The Government must defend the suits in two jurisdictions, and the whole aim of the statute was to prevent two trails of the same cause of action in separate jurisdictions. Having failed in one court, a plaintiff could not have a second trial in another court.

The plaintiff contends the statute does not apply because the cases in the district court are not against any person acting for the United States, but against the United States, and any judgment of this court could be pleaded in defense, res adjudicata, in the other cases. That would be true if this court rendered a judgment in plaintiff's favor, but it would not be true if the decision were adverse to the plaintiff, for

no judgment can be rendered by this court because it is deprived of jurisdiction to hear the case by the statute. There is no inhibition to the district court hearing the cases while a suit is pending in this court, and a judgment in that court could be pleaded in bar to the suit in this court. Where the court has no jurisdiction, the judgment rendered by it on the facts is a nullity and the doctrine of res adjudicata has no application. The complaint must be dismissed. It is so ordered.

Williams, Judge; Littleton, Judge; Green, Judge, and Booth, Chief Justice, concur.

[fol. 38] VI. JUDGMENT

At a Court of Claims held in the City of Washington on the 11th day of May, A. D., 1931, judgment was ordered to be entered as follows:

This case was submitted on the defendant's motion to dismiss for want of jurisdiction:

On consideration whereof the Court is of opinion that the motion is well taken.

It is therefore adjudged and ordered that the defendant's motion to dismiss be sustained and that the petition be and the same is hereby dismissed.

[fol. 39] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 35,951. Court of Claims. Term No. 137. Matson Navigation Company, petitioner, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed June 5, 1931. File No. 35,951.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 12, 1931

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1273)

In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 137

MATSON NAVIGATION COMPANY, a corporation,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

Brief in Support of Petition for Writ of Certiorari.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1931

No. 137.

MATSON NAVIGATION COMPANY, a corporation,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

Brief in Support of Petition for Writ of Certiorari.

The object of this petition is to obtain a review of a judgment of the Court of Claims which was rendered on May 11, 1931 (R. 36), not reported. The judgment dismissed an action instituted by the Petitioner for the payment of the balance of an open and current account between the United States and Petitioner.

The Court of Claims dismissed the action, basing its decision solely upon Section 154 of the Judicial Code (U. S. Code, Title 28, Sec. 260), which reads:

> "No person shall file or prosecute in the Court of Claims or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States."

While other actions are pending in the District Court of the United States, for the Northern District of California in respect of the same subject-matter as is here involved, those actions are against the United States itself. No action is pending in any jurisdiction against "any person * * * acting or professing to act, mediately or immediately, under the authority of the United States" in respect of the subject-matter of this action. The statute deals only with cases where an action is pending against an agent of the government and does not purport to deal in any way with the situation where another action may be pending against the United States itself.

Review by the court is sought under authority of U. S. Code, Title 28, Sec. 288, granting power to review by certiorari on petition of any party a judgment of the Court of Claims. As well as being of extreme importance to Petitioner, the matter is of general interest since the decision of the Court of Claims restricts its jurisdiction contrary to law and extends Section 154 of the Judicial Code beyond its language and intent.

STATEMENT OF THE CASE.

The action was commenced in the Court of Claims on April 6, 1927, to recover from the United States the unpaid balance upon an open, mutual, current and running account between the Petitioner and the United States, arising out of the requisition of seven of the Petitioner's vessels for war use by the United States. On December 29, 1917, written agreements were entered into between the Petitioner and the United States for the liquidation of the just compensation to which the Petitioner was entitled for the use of its vessels (R. 15). As part of the compensation for the use of the vessels the United States agreed to pay to the Petitioner the amount of all increased wages and bonuses in excess of the standard prevailing August 1, 1917, paid to the master, officers and crew of each vessel (R. 21). It is in respect of this provision of the agreements and the items set up in the accounts thereunder that the present dispute arises.

After negotiation the account was finally settled on October 18, 1926. The United States paid the Petitioner the balance of the account excepting the sum of $49,373.11, which represented credits to the Petitioner which the Shipping Board decided had been improperly allowed. This sum represented the amount of increased wages and bonuses over the standard prevailing August 1, 1917, which had been paid to the master, officers and crew of each vessel and was claimed by the petitioner as a part of the just com-

pensation fixed by the agreements. The agreement of settlement (R. 32) reserved to the Petitioner its right to sue for the recovery of this sum of $49,373.11.

On April 7, 1927, after the commencement of the action in the Court of Claims, Petitioner filed in the United States District Court for the Northern District of California seven actions in which recovery of the amounts due under these contracts in respect of each vessel was sought, with the exception that in three of the cases the amounts were reduced to $10,000 in order to come within the jurisdiction of the District Court (R. 38).

ERRORS INTENDED TO BE URGED.

The Court of Claims erroneously construed the statute as depriving it of jurisdiction of this case. The statute deprives the Court of Claims of jurisdiction only where another action is pending "against any person, who at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States". It does not profess or purport to deprive the Court of Claims of jurisdiction where other actions are pending against the United States itself, leaving such actions to be disposed of in accordance with the usual rules respecting abatement of action where another action is pending between the same parties involving the same subject-matter.

ARGUMENT.

THE STATUTE IN TERMS IS INAPPLICABLE TO THE SITUATION HERE PRESENTED.

The statute deprives the Court of Claims of jurisdiction only where another action is pending against "any person, who at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately under the authority of the United States". Nothing is there said in respect of another action pending against the United States itself, as to which a plea in abatement is available.

This court in *Corona Coal Co. v. United States*, 263 U. S. 537, 540, had occasion to construe this section. Pending an appeal from a decision of the Court of Claims dismissing an action for the value of coal requisitioned by the Fuel Administration, the plaintiff commenced an action against the Director-General of Railroads in respect of the same matter. The government's motion to dismiss the appeal because of the provisions of Section 154 of the Judicial Code was granted, the court saying:

> "At the time the alleged causes of action arose the President was acting under the authority of the United States, and the actions, being against an agent appointed by and acting for him, fall within the terms of the statute just quoted. It is urged, however, that the actions were brought ex necessitate rei, because they were about to become barred by expiration of the statutory period of limitation, and that, for this and other rea-

sons, the case is not within the spirit of Section 154, properly construed. But the words of the statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship in particular cases."

It will be noted that the court found the statute to be applicable, the second action *"being against an agent* appointed by and acting for him (the President)."

Not a single case has been found where this statute has been held applicable where the two cases are brought against the United States itself, and in fact the Court of Claims has itself held that the statute is inapplicable where both cases are against the United States.

In *Peterson v. United States,* 26 Ct. of Cl. 93, an action was brought in the Court of Claims, although a prior action involving the same issues had been instituted in the District Court. The court held that the action should not be dismissed, but should be abated pending determination of the litigation in the District Court. Such is the course that should have been pursued in this case. The present action, being the first commenced, should proceed and the actions in the District Court be abated pending this determination.

In the *Corona Coal* case, which is the only case cited by the Court of Claims in support of its ruling, this

court held, in respect of Section 154 of the Judicial Code:

> "* * * the words of the statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship in particular cases."

Since the language of the statute is plain and "no room is left for construction" to add an exception to the act to avoid hardship in particular cases, we submit that the same language leaves no room for an extension of the statute to impose a hardship in this case.

EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS.

While the plain meaning of the language used in the statute precludes any resort to rules of statutory construction, if any such rule might be resorted to, it is that of *"expressio unius est exclusio alterius"*.

Colyer v. Skiffington, 265 Fed. 17, 45;
Johnson v. Southern Pac. Co., 117 Fed. 462, 465.

Section 154 of the Judicial Code particularly specifies the conditions upon which it shall become applicable to a suit in the Court of Claims, to wit: a suit against an agent of the government. It impliedly excludes all other conditions, including the pendency of a suit against the United States itself.

THE STATUTE CANNOT BE EXTENDED BY IMPLICATION.

The Act creating the Court of Claims (10 Stats. L. 612, Ch. 122) vested it with general jurisdiction of claims against the United States. Section 154 of the Judicial Code is a restriction upon that jurisdiction under particular circumstances. Being in derogation of the statute vesting the Court of Claims with jurisdiction in actions such as here involved, its scope is not to be extended by implication beyond its clear terms. Particularly, is this true where, as in this case, the statute would be applied in a situation not within possible contemplation when the statute was enacted.

United States v. Barnes, 222 U. S. 513, 520.

THE HISTORY OF THE ACT SHOWS THAT CONGRESS DID NOT INTEND THAT IT SHOULD APPLY TO THE SITUATION HERE PRESENTED.

While we still believe that the language of the statute is so clear that "no room is left for construction", if the statute requires extrinsic aid for interpretation, the debates in Congress show that the act is inapplicable in the present situation.

In explaining the purpose of the bill which was enacted in 1868 (15 Stats. L. 77) and which subsequently became Section 154 of the Judicial Code, Senator Edmunds, Chairman of the Judiciary Committee, in reporting the bill to the Senate, said:

"The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country, here and there, and who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law then can turn around and try the whole question in the Court of Claims. The object is to put that class of persons to their election either to leave the Court of Claims, or to leave the other courts. I am sure everybody will agree to that."

Congressional Globe, Second Session, 40th Congress, 1867, 1868, p. 2769.

The bill was adopted without further discussion in Congress.

The statute was directly aimed at the practice of simultaneously maintaining an action against the United States and an action against its agents or officers in connection with the same grievance.

At the time the statute was enacted the only jurisdiction in suits against the United States was in the Court of Claims, and it was not until 1887 that the Tucker Act (24 Stats. L. 505, Ch. 359, Secs. 1 and 2) gave concurrent jurisdiction to the district courts in respect of certain actions against the United States. The statute, therefore, could not possibly have been

intended to apply in respect of two actions against the United States pending in different courts.

It is apparent, therefore, that the purpose and policy of the Act was to compel an election between two different remedies and not to compel an election between two different forums in which the same action might be prosecuted against the United States.

The plain language of the statute which leaves no possible room for the construction given thereto by the Court of Claims aptly expresses the sole intent and purpose disclosed by the history of the act.

NO REASON EXISTS FOR APPLYING SECTION 154 OF THE JUDICIAL CODE TO THE SITUATION HERE PRESENT.

While an action by a private individual against an agent of the United States is not a bar in a subsequent action by the United States against the same individual involving the same subject-matter, (*Carr v. United States,* 98 U. S. 433; *United States v. Lee,* 106 U. S. (16 Otto) 196; *Tindal v. Wesley,* 167 U. S. 204) and a judgment in favor of a litigant against an agent of the United States is not a bar to an action by the same suitor against the United States itself, (*Sage v. United States,* 250 U. S. 33) a judgment in an action between the United States and any other party creates a Bar by estoppel in any subsequent proceeding between the United States and the same party involving the same issues.

Southern Pacific R. R. v. United States, 168 U. S. 1.

In view of these rules it is evident that a definite reason existed for the adoption of the Act constituting Section 154 of the Judicial Code. It was entirely appropriate that any claimant desiring to avail himself of permission to sue the government be denied the right to prosecute at the same time an action upon the same subject-matter against the agent of the government and thereby in effect oblige the government to try twice the issues involved. Since, however, the judgment in any action against the United States bars any subsequent action upon the same claim, the existence of more than one action against the United States upon the same claim creates no risk of twice defending against the claim and there is no occasion to apply the rule of Section 154 of the Judicial Code.

Appropriate procedure has always existed to protect the United States against any embarrassment arising out of the maintenance of two actions against it involving the same subject-matter.

It frequently happens that out of an excess of caution, suits involving the same subject-matter and the same parties may be commenced in two or more courts which have jurisdiction. In such a case it is well established that the second action may be abated pending the determination of the first. The second action is not thereby dismissed but remains in abeyance pending a final judgment in the first action, and when judgment is rendered in the first, it is *res adjudicata* as to the abated action or any subsequent action between the same parties. Such is the proper course for the United States to pursue in this proceeding. The action in the Court of Claims was the

first action commenced. The actions subsequently commenced in the District Court in California may be abated pending the determination of the action in the Court of Claims. In this way the rights of both parties are protected, plaintiff is enabled to obtain a decision of its case on the merits and the government is not subject to the trouble or expense of twice defending the same claim.

In the Court of Claims it is possible to try the entire matter in dispute in a single action. Trial of these issues in the District Court would involve a separate trial as to each vessel involved.

The merits of the claim have already been determined adversely to the government in *New York and Porto Rico S. S. Co. v. United States*, 29 Fed. (2d) 1013, affirmed by the Circuit Court of Appeals in 29 Fed. (2d) 1014.

CONCLUSION.

It is respectfully submitted that the decision of the Court of Claims dismissing Petitioner's action for lack of jurisdiction, based upon the provisions of Section 154 of the Judicial Code, is erroneous and should be reviewed by this court, since:

(1) The statute by clear terms requires such dismissal only where another action is pending against a person acting for or on behalf of the United States in respect of the same subject-matter, and does not in terms apply to another action pending against the United States itself;

(2) The purpose of the statute was to avoid a multiplicity of actions where the judgment in one could

not be pleaded in bar of the other, and where the one action was not subject to abatement during the pendency of the other, a situation not present in the instant case;

(3) The history of the legislation shows that it was intended only to prevent the simultaneous maintenance of a suit against the government's agent and a suit against the United States itself, and was not intended to apply to separate suits against the United States, as to which the ordinary rules of *res adjudicata* and of abatement of actions amply protect the government;

(4) The statute was passed at a time when an action against the United States could be prosecuted only in the Court of Claims, and therefore could not have been intended to apply to a case where another action against the United States was pending in another court, as subsequently permitted by the Tucker Act.

It is respectfully submitted that the writ of certiorari should be granted.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1931

No. 137

MATSON NAVIGATION COMPANY, a corporation,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

Memorandum Replying to Respondent's Brief In Opposition.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1931

No. 137

MATSON NAVIGATION COMPANY, a corporation,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

Memorandum Replying to Respondent's Brief In Opposition.

The object of this proceeding is to obtain a review of a judgment of the Court of Claims (R. 36) dismissing the proceeding in that court upon a construction of an Act of Congress (Section 154 of the Judicial Code, U. S. Code, Title, 28, Section 260), which petitioner claims is erroneous and which the respondent does not attempt to justify. On the contrary, respondent admits in its brief (pp. 4, 5)—

> "That it is doubtful whether this decision of the Court of Claims is correct. The question never seems to have been decided before and we should be disinclined to oppose the petition if it would be necessary to decide this question upon a review of the case."

However, respondent suggests that the Court of Claims might have dismissed the action upon another ground which is presented to this court for consideration in another proceeding (*United States v. Olympia Shipping Corporation,* No. 85, October Term, 1931), and the respondent requests that disposition of such other proceeding govern the disposition of petitioner's application here.

This request of respondent fails to appreciate the fact that an opinion which contains a statement of law which, to say the least, is of doubtful correctness, should not be permitted to stand without review by this court. If the writ of certiorari should be denied, the opinion of the Court of Claims would remain the only judicial expression on the subject and establish, as a binding precedent for the Court of Claims, an erroneous construction of Section 154 of the Judicial Code.

The suggestion of the United States that the petitioner's application should be made to depend upon the action of this court in *United States v. Olympia Shipping Corporation* has no merit, since the present proceeding and the Olympia case are not similar. The dissimilarity between these cases appears not only

in the pleadings but in evidence introduced in the Court of Claims in this case, which is not a part of the record. Had the record in this case the evidence introduced by the Court of Claims on the subject the dissimilarities between the present case and the Olympia case would be obvious.

It is respectfully submitted that the respondent has suggested no good reason for deferring favorable action upon the petitioner's application for a writ of certiorari.

Respectfully submitted,

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CHARLES ELM

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 137

MATSON NAVIGATION COMPANY, A CORPORATION,
PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF OF PETITIONER.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 137

MATSON NAVIGATION COMPANY, A CORPORATION, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF OF PETITIONER.

Opinion Below.

The opinion of the Court of Claims (R. 37-40) has not yet been reported.

The Question Involved.

The only question involved in this proceeding is whether the Court of Claims was correct in holding that Section 154 of the Judicial Code (U. S. Code, Title 28, Sec. 260) deprived it of jurisdiction to hear the cause by reason of the fact that after the commencement of the action in the Court of Claims suits

were instituted against the United States in the District Court upon the same causes of action.

Statement of the Case.

This action was commenced in the Court of Claims on April 6, 1927, to recover from the United States the unpaid balance of an open, current, mutual and running account.

Acting pursuant to the Urgent Deficiencies Appropriation Act of June 15, 1917, the United States Shipping Board (which we shall hereinafter refer to as the Board) on October 15, 1917, requisitioned seven of the Matson Navigation Company's vessels for use by the Government (R. 3).

On December 29, 1917, the Matson Navigation Company and the United States entered into agreements, for the purpose of fixing a standard for the determination of the just compensation to which the owner was entitled while the vessels were in the service of the United States under requisition (R. 15). At a later date the United States appointed the Matson Company as its agent (R. 9) to husband, manage and operate various vessels of the United States.

Throughout the period of time that the Matson Company acted as the Government's agent and the time during which the vessels were under requisition, an open, mutual, current and running account was maintained between the parties, in which the United States was credited with sums received for its account by the Matson Company and was charged with the sums becoming due to the Matson Company from time to time as reasonable compensation for the use of the vessels and

also with various other sums disbursed by the Matson Company for the Government's account (R. 10-11). After negotiation the account was finally settled on October 18, 1926. At that time the United States paid the balance of the account excepting the sum of $49,373.11, which represented credits to the Matson Company which the Board decided had been improperly allowed.

This sum was measured by certain increased wages and bonuses over the standard prevailing August 1, 1917, which had been paid by the Matson Company to the master, officers and crew of each requisitioned vessel and was claimed by the Matson Company as a part of the just compensation fixed by the agreements.

A settlement agreement was entered into between the parties which reserved to the Matson Company its right to sue for the balance of $49,373.11, which it claimed (R. 32).

This proceeding was commenced on April 6, 1927, in the Court of Claims (R. 7) to recover the disputed balance. On the following day the Matson Company filed in the United States District Court for the Northern District of California, Southern Division, seven actions in which recovery of the amounts due under these contracts in respect of each vessel was sought, with the exception that in each of the cases the amounts were reduced to $10,000 in order to come within the jurisdiction of the District Court (R. 36).

Error Intended to be Urged.

The Court of Claims dismissed the cause upon the sole ground that by reason of the pendency of the ac-

tions in the District Court it was deprived of jurisdiction under the provisions of Section 154 of the Judicial Code. This statute deprives the Court of Claims of jurisdiction only where another action is pending—

> "against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States."

It does not deprive the Court of Claims of jurisdiction where other actions are pending against the United States itself. Such actions are to be disposed of in accordance with the usual rules respecting abatement of actions where other actions are pending between the same parties for the same cause.

ARGUMENT.

The Statute in Terms is Inapplicable to the Present Case.

The Statute upon which the Court of Claims solely relied in its opinion is as follows:

> "No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States."
>
> Sec. 154 of Judicial Code, c. 231, 36 Stat. 1087, 1138 (U. S. C., Title 28, Sec. 260).

This statute deprives the Court of Claims of jurisdiction only where another action is pending against "any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States." Nothing is there said in respect of another action pending against the United States itself, as to which a plea in abatement is available.

The Court of Claims cited *Corona Coal Co.* v. *United States,* 263 U. S. 537, 540, to support its view that a suit could not be prosecuted before it while suits against the United States upon the same claim are pending in the District Court. But in the *Corona* case the plaintiff had commenced an action in the District Court against the Director General of Railroads while an appeal from the Court of Claims in respect of the same matter was pending. The Government's motion to dismiss the appeal because of the provisions of Section 154 of the Judicial Code was granted, the court saying:

> "At the time the alleged causes of action arose the President was acting under the authority of the United States, and the actions, being against an agent appointed by and acting for him, fall within the terms of the statute just quoted. It is urged, however, that the actions were brought *ex necessitate rei,* because they were about to become barred by expiration of the statutory period of limitation, and that, for this and other reasons, the case is not within the spirit of Section 154, properly construed. But the words of the statute are plain, with nothing in the con-

> text to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship in particular cases."

The *Corona* case does not support the statement made by the Court of Claims. On the contrary, the court found the statute to be applicable, the second action "being against an agent appointed by and acting for him (the President)."

In not a single instance has this statute been held applicable where two cases are brought against the United States itself. The Court of Claims itself has not applied the statute where two cases are pending against the United States upon the same cause.

In *Peterson* v. *United States*, 26 Ct. of Cl. 93, an action was brought in the Court of Claims, although a prior action involving the same issues had been instituted in the District Court. The action was not dismissed, but was abated pending determination of the litigation in the District Court. That is the course which should be pursued in the District Court in the present instance. This action having been first commenced, should proceed and the actions in the District Court should abate pending this determination.

In the *Corona Coal* case this Court said, in respect of Section 154 of the Judicial Code:

> "* * * the words of the statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship in particular cases."

Since the language of the statute is plain and "no room is left for construction" to add an exception to the act to avoid hardship in particular cases, we submit that the same language leaves no room for an extension of the statute to impose a hardship in this case.

Expressio Unius est Exclusio Alterius.

While the plain meaning of the language used in the statute precludes any resort to rules of statutory construction, if any such rule might be resorted to, it is that of "*expressio unius est exclusio alterius.*"

Colyer v. *Skiffington*, 265 Fed. 17, 45;
Johnson v. *Southern Pac. Co.*, 117 Fed. 462, 465.

Section 154 of the Judicial Code particularly specifies the conditions upon which it shall apply to a suit in the Court of Claims, to wit: the pendency of another suit against an agent of the government upon the same cause. It impliedly excludes all other conditions, including the pendency of a suit against the United States itself.

The Statute Cannot be Extended by Implication.

The Act creating the Court of Claims (10 Stats. L. 612, Ch. 122) vested it with general jurisdiction of claims against the United States. Section 154 of the Judicial Code is a restriction upon that jurisdiction under particular circumstances. It is in derogation of the statute vesting the Court of Claims with jurisdiction in actions such as here involved and its scope is not therefore to be extended by implication beyond

its clear terms. Particularly is this true where, as in this case, the statute would be applied in a situation not within possible contemplation when the statute was enacted.

United States v. *Barnes*, 222 U. S. 513, 520.

The History of the Act Shows That Congress Did Not Intend That it Should Apply to the Situation Here Presented.

While we still believe that the language of the statute is so clear that "no room is left for construction," nevertheless, if the situation were otherwise and if the statute requires extrinsic aid for interpretation, the debates in Congress show that the act is inapplicable in the present situation.

In explaining the purpose of the bill which was enacted in 1868 (15 Stats. L. 77) and which subsequently became Section 154 of the Judicial Code, Senator Edmunds, Chairman of the Judiciary Committee, in reporting the bill to the Senate, said:

> "The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country, here and there, and who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law then can turn around and try the whole question in the Court of Claims. The object is to put that

class of persons to their election either to leave the Court of Claims, or to leave the other courts. I am sure everybody will agree to that."

Congressional Globe, Second Session, 40th Congress, 1867, 1868, p. 2769.

The bill was adopted without further discussion in Congress.

The statute was directly aimed at the practice of simultaneously maintaining an action against the United States and an action against its agents or officers in connection with the same grievance.

At the time the statute was enacted the only jurisdiction over suits against the United States was in the Court of Claims, and it was not until 1887 that the Tucker Act (24 Stats. L. 505, Ch. 359, Secs. 1 and 2) gave concurrent jurisdiction to the District Courts in respect of certain actions against the United States. The statute, therefore, could not possibly have been intended to apply to a case where two actions against the United States itself were pending in different courts.

It is apparent, therefore, that the purpose and policy of the Act was to compel an election between two different remedies and not to compel an election between two different forums in which the same action might be prosecuted against the United States.

The plain language of the statute, which leaves no possible room for the construction given thereto by the Court of Claims, aptly expresses the sole intent and purpose disclosed by the history of the act.

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No Reason Exists for Applying Section 154 of the Judicial Code to the Situation Here Present.

While the statute is plain and permits no resort to rules of construction, no reason exists to apply the statute to the present situation.

The Court of Claims incorrectly assumed that if it is deprived of jurisdiction while a suit is pending on the same cause of action in another court against one who acted or claimed to act under the authority of the United States, *a fortiori* it is deprived of jurisdiction where a suit was pending against the United States on the same cause in another court. In support of this assumption the Court of Claims stated that in such a case the Government must defend the suit in two jurisdictions and that the aim of the statute was to prevent two trials of the same cause in separate jurisdictions (R. 39).

But the pendency of two suits against the United States itself upon the same cause in different forms does not require two trials of the cause.

While an action by a private individual against an agent of the United States is not a bar in a subsequent action by the United States against the same individual involving the same subject-matter (*Carr* v. *United States*, 98 U. S. 433; *United States* v. *Lee*, 106 U. S. (16 Otto) 196; *Tindal* v. *Wesley*, 167 U. S. 204), and a judgment in favor of a litigant against an agent of the United States is not a bar to an action by the same suitor against the United States itself (*Sage* v. *United States*, 250 U. S. 33), a judgment in an action between the United States and any other party creates a bar

by estoppel in any subsequent proceeding between the United States and the same party involving the same issues.

Southern Pacific R. R. v. *United States,* 168 U. S. 1.

In the Court of Claims a judgment of the District Court in an action between a claimant and the United States has always been regarded as *res adjudicata* in an action upon the same claim in the Court of Claims.

LeMore & Co. v. *United States,* 32 Ct. Cl. 9.
Rymarkiewicz v. *United States,* 42 Ct. Cl. 1.
Hartiens v. *United States,* 42 Ct. Cl. 42.

In view of these rules it is evident that a definite reason existed for the adoption of the Act constituting Section 154 of the Judicial Code. It was entirely appropriate that any claimant desiring to avail himself of permission to sue the Government should be denied the right to prosecute at the same time an action upon the same subject-matter against the agent of the Government, and thereby in effect oblige the Government to try twice the issues involved. Since, however, the judgment in any action against the United States bars any subsequent action upon the same claim, the existence of more than one action against the United States upon the same claim creates no risk of a double defense against the claim, and there is no occasion to apply the rule of Section 154 of the Judicial Code.

It thus becomes apparent that the pendency of two suits against the United States on the same cause in separate jurisdictions and the pendency of a suit in

one jurisdiction against the United States and in another jurisdiction against its agent upon the same cause, present entirely different situations and a rule properly applicable in the latter case does not *a fortiori* apply to the former; on the contrary entirely different rules are applicable to the two situations. Appropriate procedure has always been available to protect the United States against any embarrassment arising out of the maintenance of two actions against it involving the same subject-matter.

It frequently happens, that, out of an excess of caution, suits involving the same subject-matter and the same parties are commenced in two or more courts which have jurisdiction. In such a situation it is well established that the second action may be abated pending the determination of the first. The second action is not thereby dismissed, but remains in abeyance pending a final judgment in the first action; and when judgment is rendered in the first, it is *res adjudicata* as to the abated action or any subsequent action between the same parties. Such is the proper course for the United States to pursue in this proceeding. The action in the Court of Claims was the first action commenced. The actions subsequently commenced in the District Court in California may be abated pending the determination of the action in the Court of Claims. In this way the rights of both parties are protected, the plaintiff is enabled to obtain a decision of its case on the merits, and the Government is not subject to the trouble or expense of twice defending the same claim.

In the Court of Claims it is possible to try the entire matter in dispute in a single action. Trial of these issues in the District Court would involve a separate trial as to each vessel involved.

The merits of the claim have already been determined adversely to the Government in *New York and Porto Rico S. S. Co.* v. *United States*, 29 Fed. (2d) 1013, affirmed by the Circuit Court of Appeals in 29 Fed. (2d) 1014.

Conclusion.

It is respectfully submitted that the record presents but one question, whether the Court of Claims properly dismissed the action for lack of jurisdiction under the provisions of Section 154 of the Judicial Code. It is submitted that in this respect the Court of Claims erred, because:

(1) The statute by its clear terms requires such dismissal only where the other action is pending against a person acting for or on behalf of the United States in respect of the same subject-matter, and does not apply to another action pending against the United States itself;

(2) The purpose of the statute was to avoid a multiplicity of actions where the judgment in one could not be pleaded in bar of the other, and where one of the actions was not subject to abatement during the pendency of the other, a situation not present in the instant case;

(3) The history of the legislation shows that it was intended only to prevent the simultaneous maintenance

of a suit against the Government's agent and a suit against the United States itself, and was not intended to apply to separate suits against the United States, as to which the ordinary rules of *res adjudicata* and of abatement of actions amply protect the Government.

It is respectfully submitted that the judgment should be reversed.

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DEC 8

CHARLES

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 137

MATSON NAVIGATION COMPANY, A CORPORATION, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

SUPPLEMENTAL BRIEF OF PETITIONER.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 137

MATSON NAVIGATION COMPANY, A CORPORATION, PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

SUPPLEMENTAL BRIEF OF PETITIONER.

The respondent has not denied that the Court of Claims erroneously held that it was deprived of jurisdiction of this cause by Section 154 of the Judicial Code. But the respondent has urged that the Court of Claims should have dismissed the suit upon the ground that the petitioner's exclusive remedy was in the District Court under the Suits in Admiralty Act.

The Court of Claims did not decide this question or comment upon it in its opinion (R., 37-40). No findings upon this subject were made although evi-

dence pertinent to this question was introduced before the Court of Claims. A complete record would enable petitioner to more fully and completely answer the respondent, but even the incomplete record will establish that petitioner's cause of action does not lie in the District Court under the Suits in Admiralty Act.

Statement of Facts Material to the Question Presented.

The petition which the Court of Claims dismissed was based upon the balance of an open, current and mutual account between the Matson Navigation Company (which we will refer to as the "shipowner") and the United States (R., 10-13). This account arose out of the following facts;

Pursuant to the Act of June 15, 1917, (40 Stats. 182, *infra* p. 51) the United States, acting through the United States Shipping Board (which we will refer to as the "Board"), requisitioned seven of the shipowner's vessels for use by the Government (R., 8). On December 29, 1917, the United States and the shipowner entered into agreements called "requisition charters" which fixed the compensation to be paid for use of the requisitioned ships (R., 8), consisting of a monthly rate to be fixed by the Board (R., 20), supplemented by the amount of any increased wages and bonuses over the standard prevailing August 1, 1917, paid by the shipowner to masters, officers and crews of the vessels (R., 20, 21).

Pursuant to contracts entered into between the United States and the shipowner, the latter agreed to manage and operate certain other vessels (R., 9, 10)

for which the shipowner was to receive compensation at rates to be fixed by the Board (R., 10).

All items of compensation becoming due to the shipowner and the United States under all of these agreements as well as all items of revenue received by the shipowner for the account of the Government were carried in a single current, mutual and running account by and with the knowledge, consent and understanding of the Government (R., 10, 11).

Negotiations for the settlement of the account culminated in an agreement entered into between the Board and the shipowner on October 18, 1926 (R., 12), whereby this account and all matters connected with the requisitioning of the shipowner's vessels and with the management and operation of the Government's vessels were settled and liquidated by payment to the shipowner of a lump sum of $134,722.67 on account of the balance due the shipowner, reserving however to the shipowner its claim to an additional balance of $49,373.11, consisting of the amount of additional wages and bonuses paid to the crews of requisitioned vessels (R., 31-33).

This suit was brought to recover the balance claimed (R., 14) on April 6, 1927 (R., 7). A motion to dismiss was filed on January 13, 1930, more than two years after commencement of the action (R., 35).

Summary of Argument

The respondent urges that the Suits in Admiralty Act afforded Matson Navigation Company (hereinafter called the "shipowner") a remedy for the lia-

bility described in its petition and that, under the authority of *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, 280 U. S. 320, remedy is exclusive and deprives the Court of Claims of jurisdiction of the cause.

The shipowner asserts that its cause does not lie under the Suits in Admiralty Act, for the following reasons:

(1) The Suits in Admiralty Act admittedly affords a remedy in the District Court only upon a cause of action within the admiralty or maritime jurisdiction, and the present cause is non-maritime in its nature, even if the action is based upon "requisition charters" because these agreements are non-maritime.

(2) The action is upon the balance of a current, mutual and running account, and hence is a non-maritime cause for which the Suits in Admiralty Act affords no remedy.

(3) Besides being non-maritime, the cause otherwise lacks the essentials of a suit under the Suits in Admiralty Act.

(4) The shipowner's remedy lies not under the Suits in Admiralty Act but under the Merchant Marine Act of 1920.

(5) The Government's Construction of the Suits in Admiralty Act would lead to confusion and uncertainty.

(6) The jurisdiction of the Courts of Law in such cases is supported by a long course of decisions.

Statutes Involved.

The statutes upon which the petitioner will principally rely are printed in the appendix, *infra*, pp. 50-58.

ARGUMENT.

I. The Suits in Admiralty Act affords a remedy only upon a maritime cause and the agreements upon which the respondent assumes that this suit is based are non-maritime in their nature.

(a) *The Suits in Admiralty Act Refers Only to a Cause in Admiralty.*

Section 2 of the Suits in Admiralty Act (41 Stats. 525, U. S. C. Title 46, Sec. 862, *infra* p. 56), which grants to certain suitors the right to maintain a libel *in personam* against the United States, restricts that remedy to "cases where if such vessel were privately owned and operated * * * a proceeding in admiralty could be maintained. * * *" This limitation has been recognized in the decisions of this court. *Johnson* v. *United States Shipping Board Emergency Fleet Corporation*, supra; *United States Shipping Board Emergency Fleet Corporation* v. *Rosenberg Bros. & Co.*, 276 U. S. 202.

(b) *The Agreements Upon Which Respondent Claims That This Proceeding is Based Are Non-maritime.*

The Government having assumed that the shipowner's claim is based upon the "requisition charters," asserts that these are maritime contracts and illus-

trates its claim by authorities which involved contracts essentially maritime in nature. In reality, the cause is based not upon these agreements but upon the balance of certain accounts. However, the "requisition charters" are, in fact, non-maritime, and can not therefore be the subject of a suit under the Suits in Admiralty Act.

The Nature of the Agreements.

It was after the shipowner's vessels had been requisitioned by, and received into, the possession of the United States that the United States presented to the shipowner certain agreements, all in the same form and each entitled "requisition charter." One such agreement was executed by the United States and the shipowner for each vessel (R., 8, 9).

At the time that the so-called "requisition charters" were executed the vessels were in the possession of the United States under requisition. The vessels were not redelivered to the shipowner before or at the time that the requisition charters were entered into (R., 9).

The so-called "requisition charter" did not confer possession on the United States. The United States continued to hold and use the vessels under the requisition which had theretofore been made. Upon this matter the agreements left no doubt. The first recital in the agreements was:

> "* * * by Requisition Order, dated —— —, 1917, pursuant to the Urgent Deficiency Act, 15 June, 1917, and the President's Executive Order 11 July, 1917, the United States has requisitioned the use of the Steamship ——,

> and the Steamship has been delivered into the possession of the United States pursuant to the Requisition;" (R., 15, 16).

They also provided:

> "The steamship shall remain in the service of the United States under the Requisition Order to be employed as and where the United States may from time to time determine and for such period of time as the United States may determine * * *" (R., 17).

Furthermore, the ship is referred to in each agreement as "the requisitioned vessel" (R., 18).

The agreement was subject to termination by the United States (R., 16) and, under certain circumstances, by the shipowner (R., 20); in fact, the agreement did not bind the Government to any specified rate of compensation and, being illusory, was subject to termination by either party. But had the agreement been terminated, the shipowner would not have been entitled to return of the vessel (R., 17). It would have been relegated, in that case, to its statutory right to proceed at law for the recovery of the as yet undetermined just compensation to which it was entitled.

Thus, the Government acquired and retained the possession and control of each vessel, not by virtue of the agreement, but in the exercise of its power of eminent domain.

Immediately upon the requisition and seizure of the shipowner's vessels the United States became obligated, under the provisions of the Urgent Deficiencies Appropriations Act of 1917 (40 Stats. 182, *infra*, p. 51)

and the Fifth Amendment to the Constitution to pay to the shipowner just compensation for use of the vessels. Under the Act, it was the duty of the President to determine this just compensation. If the compensation so determined did not satisfy the shipowner it was the President's duty to pay to the shipowner seventy-five per cent of the amount so fixed and it was the shipowner's right and privilege to maintain an action for such additional sum as would be necessary to afford the shipowner the just compensation to which it was entitled.

The object and purpose of these agreements was to fix the just compensation for use of the vessels while under requisition to the satisfaction of the shipowner and thus to avoid the necessity of judicial proceedings for that purpose. This purpose is best described in the recital of the agreement that—

> "Whereas, it is desired by the United States and by the owner to fix the compensation (hereinafter called hire) which the United States shall pay to the owner for the use of the Steamship so requisitioned, and to define by agreement the rights and duties of the United States and of the owner with respect to the operation of the vessel under the Requisition and with respect to other matters in connection therewith" (R., 16).

The second paragraph of the agreement accomplishes the purpose stated in the recital by the following provision:

> "In consideration of the compensation provided and the other obligations assumed by the

> United States hereunder, the owner accepts this requisition charter in full satisfaction of any and all claims he has or may have against the United States arising out of the Requisition and accepts the compensation herein provided for as the just compensation required by law" (R., 16).

This just compensation, the measure for which was prescribed by the agreement, was to continue only so long as the vessel was retained by the United States under requisition (R., 20).

All of the remaining provisions in the so-called requisition charter relate in one way or another to this purpose.

In determining just compensation, it was but natural that the Government should resort to current rates then being paid for vessels under charter. Certain provisions of the "requisition charter" were fashioned after clauses frequently found in charter-parties. This was done for convenience so that current charter rates might be resorted to by the United States in fixing just compensation while the vessels were in its possession.

The United States might have operated the vessels itself or if might have used the services of the shipowner for that purpose. To govern the former contingency a so-called "time form" was attached to the agreement and to govern the latter contingency a so-called "bare boat form" was attached (R., 16).

Among the provisions inserted in the time form for the purpose of assimilating the just compensation to current charter rates, was one requiring the shipowner to pay the wages of officers and crew. The just compensation under the time form was affected, among other things, by the standard of wages prevailing at that time. Therefore, to the extent that wages might subsequently be increased, the compensation would become correspondingly inadequate, and for that reason, each agreement provided that in addition to the basic compensation to be paid to the owner measured by the rate per ton fixed by the board, the owner should receive an amount equal to all increased wages and bonuses over the scale prevailing August 1, 1917, paid by the owner to the officers and crew of the vessel (R., 21).

It is apparent that the so-called "requisition charter" was neither a requisition nor a charter. It was not a requisition because the requisition had been completed on October 15, 1917, and the vessels were not surrendered to the shipowner for approximately two years thereafter (R., 9). The agreements provided specifically that the vessels should continue under the requisition theretofore made (R., 17).

Neither was the so-called "requisition charter" a charter in any sense.

> "A charter party is defined to be a contract by which a ship, or some principal part thereof, is let to a merchant, for the conveyance of

goods on a determined voyage to one or more places."

Ward v. *Thompson,* 22 How. 330;
Abbott, Shipping, Sec. 241;
Vandewater v. *Mills,* 19 How. 82.

The vessel was not hired or let by the requisition charter. In the first place, it had already been requisitioned and seized and the contract merely affirmed the requisition; and, in the second place, the ship was in the possession of the sovereign power, not for the conveyance of goods, but for any purpose which the Government might choose.

As has already been said, the true purpose of the agreement was to accomplish the desire of the United States and the owner—

> "to fix the compensation * * * which the United States shall pay to the owner for the use of the vessel so requisitioned" (R., 16).

The respondent incorrectly states, therefore, that the contracts related "solely to the operation of ships upon navigable waters" and it incorrectly refers to the suit as one for "hire" fixed by charters. The word "hire" is specifically defined in the "requisition charter" as just compensation for use of the requisitioned vessel (R., 16). The subject of the contract was solely the compensation incident to the exercise by the Government of the power of eminent domain, not a subject of suit between private parties in admiralty.

Such Agreements Are Non-maritime.

The exercise by the United States of its power of eminent domain is not a subject of Admiralty juris-

diction, whether the act relates to a ship or to any other species of property. An owner may recover just compensation by judicial proceedings, but not in a Court of Admiralty; a claim for just compensation is founded upon the Constitution and is therefore within the jurisdiction of the Court of Claims.

Phelps v. *United States,* 271 U. S. 341, 343.

This is true even if the property taken happens to be a ship and Courts of Law have assumed jurisdiction of proceedings to recover just compensation for the use of ships.

Luckenbach Steamship Co. v. *United States,* 272 U. S. 533;

Gulf Refining Co. v. *United States,* 58 Ct. Cl. 559.

The respondent apparently relies upon the fact that a so-called "requisition charter" relates to a ship, but much more than the fact that a ship is concerned is necessary to render a contract maritime in nature. A contract for the sale of a ship (*The Eclipse,* 135 U. S. 599), an agreement to construct a ship (*Edwards* v. *Elliott,* 21 Wall. 532), and a ship mortgage (*J. E. Rumbell,* 148 U. S. 1) all relate to ships in some manner, but are non-maritime. All other contracts which pertain to ships or cargoes but which do not directly relate to the carriage of goods or the navigation of ships are non-maritime. *The Thames,* 10 Fed. 848 (D. C. N. Y., 1881); *Richards* v. *Hogarth,* 94 Fed. 685 (D. C. N. J., 1899); *Norton* v. *The Richard Winslow,* 71 Fed. 426 (C. C. A., 7, 1896). The requisition and seizure of a ship by the Government does not relate to the

ship's navigation or the carriage of cargoes; it is wholly preliminary to any use of the ship by the Government and the duty to pay just compensation is based upon the Constitution, not upon any maritime principle.

A contract having for its subject just compensation is no more a proper foundation for the exercise of admiralty jurisdiction than is the question of just compensation itself. The mere fact that just compensation is fixed in one instance by agreement and in the other without agreement affords no ground for distinction, and, if such an agreement also specifies the conditions under which just compensation fixed therein is acceptable to the shipowner, it is none the less non-maritime. The subject of such an agreement is the ascertainment and payment of just compensation and the ascertainment and payment of just compensation is "a necessary condition of the taking". *Seaboard Air Line Railway Co.* v. *United States*, 261 U. S. 299, 304.

These requisition charters by recital and express provision expressed their sole purpose, to wit, to satisfy all claims arising out of the requisition and to determine the compensation required by law (see Section 2 of Agreements); and all of the provisions in the contracts are directed solely to this end or to defining the conditions upon which the compensation so fixed was acceptable to the shipowner.

It is quite true, as respondent asserts, that the shipowner's right to recover is measured by the agreements but it is also true that it is the right to just compensation which is so measured. This action to the extent that it is based upon the agreements is one to

recover just compensation even though the parties have provided a yardstick for its measurement.

Cases cited by the respondent upon this subject merely hold that the just compensation to which the shipowner is entitled, having been defined by agreement, does not include interest unless interest is provided for in the agreement; but these very cases recognize that it is just compensation which is so limited by contract, a just compensation which does not include interest unless the agreement so provides. Indeed, interest is never allowed against the Government except in condemnation proceedings. Even where property is taken for a public use without proceedings in condemnation and a promise is implied on the part of the United States to pay just compensation, interest is not payable (*United States* v. *North American Trading and Transportation Co.*, 253 U. S. 330). Nevertheless, even in such a case, where the action is upon implied contract, the nature and subject matter of the contract is the payment of just compensation.

> "In that view, we are of the opinion that the United States, having by its agents, proceeding under the authority of an Act of Congress, taken the property of the claimant for public use, is under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation where property * * * is taken pursuant to an Act of Congress, as private property to be applied for public uses."
>
> *United States* v. *Great Falls Manufacturing Co.*, 112 U. S. 645, 649.

And so, in this action, which is not in condemnation, but to recover just compensation fixed by express contract, interest is not payable because not provided for. But this express contract relates even more directly than the implied contract referred to in *United States* v. *Great Falls Manufacturing Co.*, to the "obligation, imposed by the Constitution, to make compensation." "Requisition charters" have been considered and declared to be contracts merely liquidating the just compensation to which the shipowner was entitled as the result of a lawful seizure.

Huron Navigation Co. v. *United States*, 60 Ct. Cl. 770 (1925);

Atlantic Refining Co. v. *United States*, 69 Ct. Cl. 713 (1930);

Luckenbach Steamship Co. v. *United States*, 299 Fed. 876 (S. D. N. Y. 1924).

In the case last cited, the court said:

> "Thus it appears that the just compensation of the Statute was fixed by agreement."

The "requisition charters" deal with the non-maritime subject of just compensation and the shipowner has, therefore, no remedy under the Suits in Admiralty Act. Its sole remedy is at law under the Tucker Act.

(c) *Even if the Requisition Charters Contained Provisions Maritime in Their Nature, Admiralty Would Not Have Jurisdiction.*

We have said that certain clauses are found in the so-called requisition charters which are sometimes

found in true charters, but the mere presence of such provisions could not confer jurisdiction upon admiralty. The provisions relating to the requisition and just compensation are their essence. If any provision could be found which might properly be said when taken by itself, to be maritime in nature, it would nevertheless remain a provision purely subordinate and incidental to the essential non-maritime nature and purpose of these agreements.

But, let us assume for argument's sake that there are provisions which are not purely incidental to this purpose, but which might even be conceived to be foreign to this purpose, nevertheless, all stipulations in these "requisition charters" are mutually dependent one upon another. These "requisition charters" fix but one compensation designated in the agreements as "just compensation." If this just compensation does in fact recompense the shipowner for services which might be termed maritime, as well as for the use of the ship, the compensation is not susceptible of separation into its component parts.

Even if the respondent could find among the clauses expressing the conditions upon which the compensation is acceptable, provisions which, standing alone, might be regarded as maritime in their nature, jurisdiction would not thereby be conferred upon admiralty, for admiralty is without jurisdiction of contracts which are part maritime and part non-maritime. *Norton* v. *The Richard Winslow,* 71 Fed. 426 (C. C. A. 7, 1896).

It is for this reason that the charter of a vessel to be used as a mariner's school is non-maritime.

"It is not enough that the contract includes a maritime adventure among its objects, or that it was to be performed at sea. Unless it was purely maritime, it was not one of which a court of admiralty has jurisdiction. In the language of Justice Clifford, in *The Belfast,* 7 Wall. 637 (19 L. Ed. 266):

" 'Contracts, claims or services, purely maritime, and touching rights and duties appertaining to commerce and navigation, are cognizable in the admiralty courts.'

"Contracts of a mixed nature are not cognizable in these courts, and that there is a sufficient reason for this is well illustrated by the present case. Here is the ordinary contract between school proprietors and patrons, with the further provisions that the school is to be located on shipboard, and the course of instruction is to include a foreign voyage and studies in nautical and naval matters. Combined with the provisions of a common-law obligation are some that may relate to maritime services. How can a court of admiralty separate the liabilities and apportion the damages arising from the breach of the maritime part of the contract? Whenever the principal subject-matter of a controversy belongs to the jurisdiction of a court of common law, or of equity, the incidental matters must also be relegated to the appropriate jurisdiction, notwithstanding of themselves they might be cognizable in admiralty. *Kellum* v. *Emerson,* 2 Curt. 79, Fed. Cas. No. 7,669; *Grant* v. *Poillon,* 20 How. 162, 15 L. Ed. 871; *Minturn* v. *Maynard,* 17 How. 477, 15 L. Ed. 235; *Hall* v.

Hudson, 2 Sprague, 65, Fed. Case, No. 5,935; *Vandewater* v. *Mills,* 19 How. 82, 15 L. Ed. 554."
The Pennsylvania, 154 Fed: 9 (C. C. A. 7, 1907).

Upon this subject the authorities are in complete agreement. *Norton* v. *The Richard Winslow, supra; Pacific Coast Steamship Co.* v. *Ferguson,* 76 Fed. 993 (C. C. A., 9, 1896); *The Ada,* 250 Fed. 194 (C. C. A., 2, 1918); *The Virginia,* 1 Fed. Cas. 306 (No. 141); *Graham* v. *Oregon R. & N. Co.,* 134 Fed. 454 (D. C. N. Y., 1904). It is obvious, to say the least, that the "requisition charters" are predominantly civil in their nature and that the various provisions of each are dependent one upon another.

Clause Tenth of the "Requisition Charters", which the Government asserts is the subject of dispute in this action, together with clause Eighth fixed the standard not of "hire", as respondent states, but of "just compensation" and are peculiarly non-maritime.

(d) *However Much the So-called "Requisition Charters" May Resemble Charter-parties, They Are Non-maritime.*

The respondent has cited authorities which establish that a charter-party is a maritime contract. But the "requisition charters" are not charter-parties. And, even conceding for purpose of argument that a "requisition charter" may be said to resemble a charter-party in some respects, that fact does not confer jurisdiction on admirality.

While the English criteria of admiralty jurisdiction has been discarded in this country since *DeLovio* v. *Boit*, 7 Fed. Cas., 418, and a more liberal rule adopted, this jurisdiction has always remained a strict and limited one.

Courts of Admiralty in this country have jurisdiction only over contracts essentially maritime in their nature. The phrase "essentially maritime" is strictly limited to certain contracts directly and immediately affecting the navigation of a ship or the transportation of goods on the high seas. It may be true that on occasions trial courts have stretched the jurisdiction in doubtful cases to avoid depriving a suitor of relief, but it has never been extended to deprive a suitor of his remedy.

A Court of Admiralty is a court of special jurisdiction and no presumption will be indulged in to extend the scope of its jurisdiction, which must be affirmatively shown.

> "The rule of strict limitation is uniformly recognized and generally applied in the admiralty courts. Instances are numerous of its application and denial of jurisdiction in reference to causes which appear to be maritime in certain aspects, but are not purely maritime in the jurisdictional sense."
>
> *Pacific Surety Co.* v. *Leatham & Smith*, 151 Fed. 440 (C. C. A., 1907).

> "The lines of the jurisdiction of the admiralty are strictly defined and while in the American Courts the jurisdiction has been enlarged from the English rule * * *, so that

> now the test of jurisdiction is whether or not the contract has reference to maritime service or maritime transactions, its scope has, nevertheless, not been further extended, but remains as defined by the Supreme Court in *Insurance Co.* v. *Dunham*, 11 Wall. 1 * * *".
>
> *Pacific Coast S. S. Co.* v. *Ferguson*, 76 Fed. 993, 996 (C. C. A., 9, 1896).
>
> *Richards* v. *Hogarth*, 94 Fed. 684 (D. C. N. J., 1899).
>
> *Plummer* v. *Webb*, 19 Fed. Cas. 891 (No. 11233).

And so, before admiralty can assume jurisdiction over a controversy arising out of contract, it must clearly appear that the agreement falls into one of the recognized classes of maritime contracts.

The rule laid down by this Court in *Vandewater* v. *Mills*, 19 How. 82, definitely marks such a contract as the "requisition charter" as non-maritime. In that case steamship owners had agreed to run vessels between New York and San Francisco and divide the profits. The contract contained many provisions characteristic of charter-parties. It related to ships and their use as such and to commerce on navigable waters, but the court disposed of the claim that such a contract was within the admiralty jurisdiction, as follows:

> "We have examined this case from this point of view, because the libel seems to take it for granted that every breach of contract, where the subject matter is a ship employed in navigating the ocean, gives a privilege or lien on the vessel for the damages consequent thereon, and because it was assumed in the agreement that

if this contract was in the nature of a charter-party, or had some features of a charter-party, the court would extend the maritime lien by analogy or inference for the sake of giving the libelant this remedy, and sustaining our jurisdiction. But we have shown this conclusion is not a correct inference from the premises, and that this lien, being *stricti juris*, will not be extended by construction. It is, moreover, abundantly evident that this contract has none of the features of a charter-party. A charter-party is defined to be a contract by which an entire ship, or some principal part thereof, is let to a merchant for the conveyance of goods on a determined voyage to one or more places. Abb. Ship., 241.

"Now, by this agreement, the libelant has not hired The Yankee Blade, or any portion of the vessel; nor have the master or owners of the ship convenanted to convey any merchandise for the libelant, nor has he agreed to furnish them any. But the agent for The Yankee Blade 'agrees that when The America arrives at Panama, The Yankee Blade shall leave New York conveying passengers and freight,' which were afterwards to be received by The America and transported to San Francisco; and the passage money and freight earned was to be divided between them—25 per cent to The Yankee Blade, and 75 to The America.

"This is nothing more than an agreement for a special and limited partnership in the business of transporting freight and passengers between New York and San Francisco, and the mere fact that the transportation is by sea and not by land, will not be sufficient to give the court of admiralty jurisdiction of an action for

> a breach of the contract. It is not one of those to which the peculiar principles or remedies given by the maritime law have any special application, and is the fit subject for the jurisdiction of the common-law courts."

Ward v. *Thompson*, 22 How. 330, is equally decisive. There libelant chartered a boat to respondent who was to *operate* it as a passenger and freight boat and *employ the crew*, one-half of profits to be paid to libelant. The Court said:

> "The articles of agreement containing the contract, which is the subject-matter of this suit, are denominated in the libel a charter-party of the steamboat Detroit to respondent. The answer denies that he had chartered the vessel, and alleges that the writing declared on is a contract of partnership, and not a charter-party. The circuit court agreed with the respondent as to the construction of the contract, and consequently dismissed the bill.
>
> "A court of admiralty takes cognizance of certain questions between part owners, as to the possession and employment of the ship, but will not assume jurisdiction in matters of accounts between them. *The Orleans* v. *Phœbus*, 11 Pet. 175. It is not disputed that a contract of partnership in the earnings of a ship comes within the same category. If the party desires an account, his remedy is in a court of chancery. If his complaint be for a breach of some independent covenant, he should seek his remedy in a court of common law.
>
> "A charter-party is defined to be 'a contract by which a ship, or some principal part thereof, is let to a merchant, for the conveyance of goods

on a determined voyage to one or more places.'

"A contract of partnership is where parties join together their money, goods, labor or skill, for the purpose of trade or gain, and where there is a community of profits.

"The only characteristics of a charter-party to be found in this contract are, that the subject of it is a ship, and that libelants are owners. There is no letting or hiring of the ship to the respondent for a given voyage, to be employed by him for his own profit."

The Ada, 250 Fed. 194 (C. C. A., 2, 1918).
Alberti v. *The Virginia*, 1 Fed. Cas. 306 (No. 141).

The shipowner in the present case did not contribute a ship or agree to do so. Its vessels were taken without the consent of the owners, who merely assented to terms of requisition offered by the Government.

It is respectfully submitted that the so-called "requisition charter" less resembles a true charter-party than the agreements considered in *Vandewater* v. *Mills*, and *Ward* v. *Thompson*, and that it cannot be subject to the limited jurisdiction of admiralty.

The only case cited by respondent which did not involve a true charter party is *United Fruit Co.* v. *Fleet Corporation*, 42 Fed. (2d) 222 (D. C. Mass.). That case did not involve either a requisition charter or a true charter-party. It involved only the breach of an agreement to maintain a vessel engaged in the merchant trade in a seaworthy condition. This covenant was part of an agreement for the operation of a vessel in the merchant service. No requisition and no liqui-

dation of just compensation was involved in that case.

It is submitted that the "requisition charters" are non-maritime and unenforceable under the Suits in Admiralty Act..

II. This action is upon the balance of a current, mutual and running account and hence is a non-maritime cause for which the Suits in Admiralty Act affords no remedy.

In reality, this suit is based not upon the "requisition charters" but upon the balance of an open, current and mutual account between the shipowner and the respondent. This account was made up of sums accruing from time to time to the shipowner as the reasonable compensation for the use of its vessels and various items of revenue becoming due to the United States in connection with the operation of these and other vessels (R., 12, 13).

The exact nature of these accounts is not disclosed by the record before this Court. The record before the Court of Claims discloses that the items constituting the account were of various and divers sorts. No one would deny that many of these items are non-maritime in nature. In the present record it will suffice to refer to items constituting just compensation due to the shipowner and the shipowner's compensation as agent of the United States.

It is settled that the sole jurisdiction of an action upon the balance of an account is at law.

In *Minturn* v. *Maynard,* 17 How. 476, 497, the court said:

> "The libel shows nothing but a demand for a balance of accounts between agent and principal for which an action of assumpsit in a common law court is the proper remedy."
>
> *The Steamer Eclipse,* 135 U. S. 599.
> *Grant* v. *Poillon,* 61 U. S. (20 How.) 162.

Admiralty will not take jurisdiction of an action for an accounting and will only take an accounting where to do so is a mere incident to the relief afforded in an action which is for some other reason within the admiralty jurisdiction.

The Zellah May, 221 Fed. 1016.

Respondent does not refer to *Minturn* v. *Maynard, The Steamer Eclipse* or *Grant* v. *Poillon,* which settle the rule upon this subject. Instead, it cites cases involving the principles of an account stated. But there is no similarity between the effect of an account stated and of a mutual, current and running account.

An account stated does not alter the nature of an indebtedness.

> "It is not, strictly speaking, the statement of new debt but merely the acknowledgment of an old one."
>
> *State* v. *Illinois Central R.,* 246 Ill. 188, 92 N. E. 814;

And the creditor may always disregard the statement of account and maintain his action on the original indebtedness.

Big Four Implement Co. v. *Chesney,* 204 Mo. App. 285, 223 S. W. 944, 945.

And so it is that a statement of account does not alter the nature of a maritime cause and deprive admiralty of jurisdiction. That is the extent to which respondent's cases go. They do not touch upon suits for the balance of current accounts, to which a very different rule applies.

> "It has been uniformly held that distinct and different items of charge, in an open and mutual account, do not constitute separate claims, but that the claim or debt is found in the balance of the account; and that it is the balance only that constitutes the claim of the party to whom it is due."
>
> *Hodge* v. *Manley,* 60 Am. Dec. 254, 25 Vt. 210.

And when a charge has become a part of an open and running account, it cannot be taken out of the account because liability is denied.

F. Berg & Co. v. *Strother,* 207 Mo. App. 45, 230 S. W. 364.

The respondent has also suggested that the claim which is the subject of this suit was excluded from the settlement between the Board and the shipowner and hence did not lose its identity in a general balance but was regarded as a distinct and separate item. But it clearly appears that the items in question became a part of the mutual account long prior to the settlement agreement (R., 10, 11) and the only right which the shipowner ever had was to payment of the balance

of that account. No denial of liability by the United States could separate these items from the account of which they were properly a part (*F. Berg & Co.* v. *Strother, supra*) and the settlement agreement did not purport to do so. The settlement agreement confirmed the existence of the account by payment of a lump sum on account of the disputed balance and reserved the preexisting right of the shipowner to sue for the balance claimed and identified the items constituting the disputed balance.

III. In addition to being non-maritime, this cause is not maintainable under the Suits in Admiralty Act because it does not arise out of the ownership, possession or operation of ships as merchant vessels.

(a) *The Requisition Charters Were Not Incident to the Use of Vessels as "Merchant Vessels."*

The Suits in Admiralty Act subjects the sovereign to liability to suit and therefore must be strictly construed. *Eastern Transportation Co.* v. *United States,* 272 U. S. 675, 686.

Furthermore, the Court of Claims (24 Stats. 505, Ch. 359, U. S. C., Title 28, Sec. 250) is vested with general jurisdiction of claims against the United States. The Suits in Admiralty Act is in derogation of that jurisdiction to the extent that it confers jurisdiction in matters of contract on a court of special and limited powers. For that reason the Suits in Admiralty Act must not be extended beyond its clear terms. *United States* v. *Barnes,* 222 U. S. 513, 520.

The Suits in Admiralty Act not only restricts actions maintainable thereunder to those which are maritime in nature; it also restricts such actions to those connected with ownership or operation of a ship while employed as a "merchant vessel." This limitation excludes not merely non-maritime causes but causes of any nature which are not clearly and directly connected with the activities of ships which are engaged in the merchant service.

The respondent states that the shipowner's vessels were operated for the United States as merchant vessels when the transactions out of which this claim arises took place. This we cannot concede because it is not a fact. It is true that the requisitioned vessels were operated by the shipowner in the carriage of freight and passengers (R., 7), but in October of 1917 these vessels passed into the possession of the United States and were not returned until 1919 (R., 8, 9). The "requisition charters" do provide that the vessels shall not have the status of public ships unless they are in the service of the War or Navy Department (R., 18). But the record does not show whether the ships were or were not in the service of the War or Navy Department.

Furthermore, the Suits in Admiralty Act does not apply to matters connected with the operation of a ship in any governmental service whether in the service of the War or Navy Department or otherwise. The record is devoid of any evidence that any one of the ships was ever used as a merchant vessel by the United States. In truth the Government did use the shipowner's vessels in part in the service of the War and Navy De-

partments. But for all that the record shows, this may or may not be the fact, and unless and until it shall be made to appear by the respondent that this is the fact, it cannot establish that petitioner has any action maintainable under the Suits in Admiralty Act.

But wholly apart from any use to which the vessels might have been devoted, these requisition charters were preliminary and anterior to the use of the vessels by the United States and in no sense identified with, or incidental to, the use of the vessels as merchant ships. None of the vessels acquired character either as public ships or merchant ships, by virtue of the seizure of the "requisition charters." Thereby, the ships were merely placed at the disposal of the United States and appropriate provision made to fix the owner's compensation. If the Government should have thereafter devoted them to a merchant use, this was the exercise of an election with which the shipowner was not concerned and over which it had no control. If the vessels did thereafter acquire character as merchant vessels for a portion of the time or continuously, such character was acquired entirely independent of the seizure or the "requisition charters," neither of which can therefore be said to be incidental to the operation of the vessels as merchant ships.

If the United States having seized the ships and arranged for just compensation devoted any of them to commercial uses, then, such liabilities as were incidental to that use and such liabilities only would fall within the Suits in Admiralty Act. It was by no means, a natural or probable consequence of the execution of a "requisition charter" that the subject thereof

would be employed in the merchant trade. The only legal consequence or result of the "requisition charter" was to provide the means of fixing compensation, whatever the use to which the Government might devote the vessel. The United States concedes that, if in fact the vessels were not used as merchant vessels, this cause does not come under the Suits in Admiralty Act. Yet the United States was not obligated to do so and, if in fact it did so after the seizure, its election did not alter the nature of the agreements which had already been made.

Indeed, it is difficult to conceive how any charter between an owner of a vessel and the United States could furnish the foundation for a cause enforceable under the Suits in Admiralty Act. The means whereby a vessel is placed at the unrestricted command and disposition of the government does not arise out of the ownership, possession or operation of a ship as a merchant vessel by the United States. It is for this reason that it has been said that the Suits in Admiralty Act applies only to suits against the United States by third parties dealing with the ship or suffering from her faults. It is not based, as the respondent suggests, upon the claim that the Act was solely designed to relieve ships of the embarrassment of *in rem* proceedings.

In *N. S. Byonnes & Son Dampskibsrederi Aktieselskab* v. *United States,* 298 Fed. 123, 124 (S. D. N. Y.), Judge Hand in discussing the rights of an owner who had chartered his vessel to the United States stated the same distinction in somewhat different language:

> "It was a remedial act to those who should be injured by the dealings of ships owned or operated by or for the United States, third persons whom the sovereign immunity of the United States deprived of any remedy. These did not include owners who had a contract on which they might sue in the Court of Claims or under the Tucker Act. I need not be so absolute as to say that an alternative remedy would bar relief under this statute, but I should, I think go far enough to hold that it runs only for those who may be regarded as either treating with the ship or suffering from her faults. Owners are not in either class."

The "requisition charters" were between the United States and the shipowner and did not arise out of ownership, possession or operation of ships as merchant vessels by or for the government. The requisition charters did not arise out of the possession of the Government, but its possession did arise out of the seizure. The operation was subsequent to the seizure and the contracts, and whether or not the operation arose out of the seizure or the contracts, neither the seizure nor the contracts arose out of the operation of merchant vessels.

(b) *The Suits in Admiralty Act Does Not Apply To This Cause Because it is Incident To the Exercise of a Governmental Function.*

The Suits in Admiralty Act was solely concerned with liabilities of the United States incurred in the course of the employment of ships as merchant vessels. It did not deal with the exercise of any govern-

mental function. A series of Statutes was adopted between 1917 and 1920 which dealt exclusively with the exercise of governmental functions relating to shipping including the requisition of ships and the determination and payment of just compensation. Section 2 of the Merchant Marine Act of 1920 was such a statute (41 Stats. 988, *infra* p. 56). The requisition of the shipowner's vessels and the "requisition charters" are governed solely by the latter group of statutes and are wholly foreign to the subject of the Suits in Admiralty Act:

The Suits in Admiralty Act Did Not Apply to Causes Incident to the Exercise of Governmental Functions.

The Shipping Act of 1916 (39 Stats. 728) authorized the United States through corporate agency to operate and maintain merchant ships (Sec. 13) and to charter, lease and sell ships to citizens (Sec. 7). It also subjected (Sec. 9) all vessels in which the United States had any interest to proceedings *in rem* to answer for any obligation or fault of the ship so long as it was operated solely as a merchant vessel.

The Lake Monroe, 250 U. S. 246.

This was the unsatisfactory condition of the law until the Suits in Admiralty Act was adopted. Its purpose was to relieve the United States of the inconvenience resulting from the seizure of its vessels by substituting for a proceeding *in rem* one *in personam* and also to authorize a libel *in personam* where the United States "was the owner of an offending ves-

sel, like that of a private owner, * * * in cases where there was no basis for an action *in rem.*"

United States v. *Rosenberg Bros.*, 276 U. S. 202, 212.

This act dealt exclusively with liabilities which were peculiar to the operation of a merchant vessel, for it provided a remedy only in those cases where if the vessel involved "were privately owned or operated * * * a proceeding in admiralty could be maintained at the time of the commencement of the action * * *."

Its application was specifically restricted to activities of the United States as the owner or operator of ships in a mercantile capacity thereby excluding activities of the United States in the exercise of governmental functions.

The whole tenor of the Act is in keeping with this limitation. It is provided, Section 3—

> "That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties."

By Section 6 there is conferred on the United States the benefit of all exemptions and limitations of liability accorded by law to private persons.

Obviously the principles of law applicable in transactions between private parties are wholly inapplicable in controversies arising out of the exercise by the government of its functions and powers as sovereign.

Section 2 provides that an action may be maintained only "provided that such vessel is employed as a

merchant vessel * * *." Thus the remedy relates only to acts or liabilities peculiar and incidental to the actual operation of a ship as a merchant vessel.

The Emergency Shipping Laws and the Merchant Marine Act of 1920 *Govern All Actions Arising Out of the Emergency Shipping Powers of the President.*

In sharp contrast with statutes relating to activities of vessels of the United States engaged in the merchant service was the emergency shipping legislation enacted during the war with Germany to place the shipping facilities of the country at the disposition of the Government.

Such an emergency act was the Act of June 15, 1917, which appropriated funds for various war purposes and empowered the President to purchase ships and materials, to requisition contracts for the building of ships, to take over possession of shipbuilding plants, and to "purchase, requisition or take over the title to, or the possession of, for use or operation by the United States, any ship now constructed or in the process of construction * * *" (*Infra*, p. 51).

It also directed the President to fix just compensation for the use of any requisitioned ship and, should the amount so determined be unsatisfactory to the owner, to pay 75 per cent of the amount so fixed, reserving to the shipowner the right to proceed under the Tucker Act to recover the balance claimed. The act further directed that all ships requisitioned should be managed, operated and disposed of as the President might direct.

This Act, placing at the disposal of the United States the country's shipping facilities, related to a function which was a strictly governmental one and was one of a series of similar statutes vesting in the President extraordinary powers over the nation's resources, including its shipping facilities.

In 1920, when hostilities had ceased and the necessity of exercising these powers had ended, the Merchant Marine Act of 1920 (40 Stats. 988) was adopted. This act was pending in Congress when the Suits in Admiralty Act was adopted. It repealed (Sec. 2) the provisions of the emergency legislation which had empowered the President to requisition, seize, acquire by purchase or contract, and regulate the shipping facilities of the country. It also provided for liquidation of liabilities of the United States growing out of the exercise of these governmental powers under the acts repealed, but not the liabilities of the United States incidental to the operation of ships as merchant vessels since this had already been provided for in the Suits in Admiralty Act.

The Merchant Marine Act of 1920 directed the Board to assume and carry out all agreements lawfully entered into under the emergency legislation repealed (Sec. 2(*b*) 1.) It also (Sec. 2(*b*) 2) preserved all existing remedies resulting from any act or agreement arising out of any action taken under the emergency laws repealed and provided a remedy against the United States. Section 2 (*c*) directed the Board to settle and liquidate all matters incident to the exercise of any of the President's powers under the emergency laws repealed, vested the Board for this purpose with

the power and duty of the President to determine and pay just compensation and afforded to every person dissatisfied with any decision of the Board a remedy against the United States.

The same Congress which had, by enacting the Suits in Admiralty Act, provided a complete system for the settlement of controversies incidental to the operation of vessels of the United States for commercial purposes, provided, by enacting the Merchant Marine Act of 1920, a complete system for the settlement of controversies incidental to the exercises of the powers conferred on the President by the emergency shipping laws. The Merchant Marine Act of 1920 did not exclude maritime causes because it was the purpose of that Statute to provide a remedy for all causes incidental to the exercise of emergency powers whether they might be civil or maritime, at law or in equity. The Suits in Admirality Act on the other hand had provided a remedy for maritime causes incident, not to the exercise of governmental functions, but to commercial enterprises only.

This purpose of Congress is confirmed by the fact that the Suits in Admirality Act vested the Board with power to compromise and settle claims upon which suit would lie thereunder (Sec. 9). The Merchant Marine Act likewise conferred on the Board power to settle all claims arising under the emergency shipping legislation (Sec. 2*c*). Had the power to compromise and settle claims under the earlier act included maritime claims incident to the exercise of emergency power Congress would not have had occasion to confer that power under the later Act.

That Congress did not believe that the Suits in Admiralty Act related to claims arising out of the exercise of the governmental functions described in the Emergency Shipping Law, appeared in the explanation made when Section 2 of the Merchant Marine Act of 1920 was reported and explained by the House Committee on Marine and Fisheries as follows:

> "This bill does not delegate to the Shipping Board any new powers. It does, however, give the board full power to adjust, settle and liquidate all matters arising out of or incident to the administration of those emergency laws and to wind up the business and dispose of the property and settle the claims which have grown out of the administration of the law by the Shipping Board and the Emergency Fleet Corporation under the powers delegated to them by the President of the United States under the acts repealed by Sec. 1 of the bill."
>
> *Congressional Record*, Vol. 58, Part 8, p. 7998.

While the scope of Section 2 of the Merchant Marine Act of 1920 has never been defined, this Court has said that—

> "The words of Subdivision *b* (2) saving all existing remedies which 'may be exercised and enforced in like manner, subject to the provisions of Subdivision (*c*)' must be taken to preserve the old remedies and to give the new one if the matter is one which the board is authorized to settle by (*c*)."
>
> *United States* v. *Harwood*, 281 U. S. 519, 527.

And, again, referring to the matters which the Board is authorized to settle by Section 2*c*, this Court said in *United States* v. *McCarl*, 275 U. S. 1, 11:

> "If, on the other hand, the contracts were made and canceled by the Fleet Corporation under the power delegated by the President, the settlement and adjustment of the claim falls clearly within the powers conferred by Section 2 (*c*) upon the Shipping Board."

The respondent suggests that the remedy conferred by Section 2 (*c*) relates solely to the power of the President to fix just compensation. But the section is clearly broader in its scope.

After directing the Board to settle, adjust and liquidate all matters incident to the exercise of the President's powers and duties under the emergency shipping laws, Section 2 (*c*) continues that "for this purpose" (that is, to settle all matters incident to the exercise of any such power or duty of the President), "the Board * * * shall have and exercise any of *such* powers and duties relating to the determination and payment of just compensation." Congress contemplated that the President had powers and duties other than the determination and payment of just compensation but vested the latter powers in the Board to the end that it would be clothed with all authority needed to adjust all matters. These provisions were followed with a proviso which empowered "*any* person dissatisfied with *any* decision of the Board" to sue the United States just as he might have done had the decision been made by the President under one of the repealed

acts. This remedy was not restricted to the question of just compensation but referred to any decision of the Board and the power to determine and pay just compensation was conferred on the Board merely to enable it to more effectively "settle all matters" growing out of any power or duty of the President under an act repealed.

The emergency powers of the President included the power to requisition ships, the power to pay as well as to preliminarily fix just compensation and the power to determine how vessels acquired by the United States should be operated, managed or disposed of.

A decision made by the President in the exercise of any such power was as much a decision as a decision determining just compensation. Each decision of the President was as much subject to judicial review as another. It was the Board's duty to consider and decide all controversies and it was a dissatisfied claimant's right to sue after any such decision had been made.

This construction is the only reasonable one. It alone harmonizes with the expressed desire of Congress to empower the Board to adjust, settle and liquidate all matters incident to the administration of the emergency laws and to settle the claims which grew out of the administration of the law by the Shipping Board and the Emergency Fleet Corporation under the powers delegated to them by the President of the United States by the acts repealed by Section 2. *Congressional Record,* Vol. 58, Part 8, p. 7998.

Thus the Suits in Admiralty Act and Section 2 of the Merchant Marine Act of 1920 together provide

remedies for all causes arising out of the Government's shipping activities, the former act embracing only those claims which arise out of the Government's participation in the shipping business and the latter act embracing all claims incident to the exercise of the governmental functions referred to in the emergency shipping legislation.

This Cause Is Incident to the Exercise of An Emergency Power of the President and Therefore Lies Under the Merchant Marine Act of 1920 and Not Under the Suits in Admiralty Act.

The "requisition charters" were not entered into in the operation of ships as merchant vessels. The President had the power to seize vessels and to enter into agreements with reference to just compensation for the use thereof solely by virtue of the powers conferred by the emergency shipping laws. Whether the "requisition charters" confirmed the requisitions and liquidated just compensation, as we assert, or superseded the requisition and right to compensation, as respondent contends, these agreements all arose, not out of the operation of the government's vessels in commercial pursuits, but out of the exercise of governmental functions under the emergency shipping laws.

It was the duty of the Board, therefore, to adjust and settle the claim and the shipowner's right, under the Merchant Marine Act of 1920, if dissatisfied with the decision of the Board, to pursue the remedy provided thereby.

Indeed, even if the remedy afforded by the Merchant Marine Act of 1920 were restricted as the respondent

has suggested to the matter of just compensation it would afford a remedy to the shipowner in this case. The so-called "requisition charters" grew immediately out of the exercise by the President of his power to fix just compensation. The requisition charter but defined the compensation determined by the President and constituted acceptance of that compensation by the shipowner. This action is not the less one to recover the just compensation because the amount is to be ascertained by reference to a written agreement. Though the amount of just compensation, as respondent states, depends on "what the parties intended by the agreement" the subject of this action is the just compensation so to be determined.

Furthermore, Section 2 (*c*) specifically refers to the power and duty of the President not only for determination, but also for *payment* of just compensation when fixed. This action is one to compel *payment* of just compensation to be determined by the agreements. The payment of just compensation is a duty specifically referred to in Section 2 (*c*), and enforceable thereunder.

It has been held that a dispute under a requisition charter is one which the Board is authorized to decide under Section 2 (*c*) of the Merchant Marine Act of 1920.

Luckenbach Steamship Co. v. *United States,* 42 Fed. (2d) 156 (C. C. A., 2, 1930).

Luckenbach Steamship Co. v. *United States,* 299 Fed. 876 (S. D. N. Y., 1924).

If so, such a dispute is one to be adjudicated under the provisions of the Merchant Marine Act of 1920 (*United States* v. *Harwood*, 281 U. S. 519, 527) and is not one embraced in the Suits in Admiralty Act.

With the present claim enforceable under the Merchant Marine Act of 1920, may be contrasted the claims involved in *Johnson* v. *United States*. In the Johnson case vessels of the United States, acquired in some manner not stated and not important for the purposes of the case, had been devoted to the merchant service. The complaints were based upon contracts of affreightment and personal injuries to seamen, all incidental to the operation of vessels while they were so devoted. Thus, they were claims peculiar to the operation of ships as merchant vessels and unrelated to the exercise by the President of any of his emergency powers. The Johnson case illustrates one category and the case at bar illustrates the other.

IV. The Government's Construction of the Suits in Admiralty Act would lead to confusion and uncertainty.

The claim that this suit lies under the Suits in Admiralty Act would lead to absurdities which it cannot be believed Congress ever intended. If the shifting uses to which a vessel publicly owned may be put are to govern the rights of the parties under pre-existing contracts, the shipowner will be in perpetual doubt and difficulty as to the forum and the remedy available for his protection and will be subjected to the embarrassment of splitting his causes of action to suit the exigencies of the case. Thus, what would properly be

regarded as a single cause of action may be artificially divided into a number limited only by the number of times that the United States might change the use to which the ship is to be devoted.

The claims to which the Suits in Admiralty Act refers, are solely those arising while the vessels are employed as merchant vessels. The record does not show that the shipowner's vessels were ever used as merchant vessels. It does not appear how they were used. But for the sake of argument let us assume that these vessels were used, in part at least, as merchant vessels.

Under the so-called requisition charters the owner's vessels remained completely at the disposal of the United States. They specifically provided that the requisitioned vessels might be engaged in the military or naval service, in which event the vessel would have the status of a public ship. The United States was free to charter the vessel to a third person if it desired and if it did so, no claim arising during the period of the charter would be enforceable under the Suits in Admiralty Act. *N. S. Byonnes & Sons Damskibsrederi Aktieselskab* v. *United States*, 298 Fed. 123 (S. D. N. Y.). The ship was always subject to the order and directions of the United States, which was free to employ the ship in any national service. Throughout the period of the requisition, for whatever purpose the ship was used, whether as a public ship or as a merchant ship, or for charter to others, the so-called requisition charter continued in full force and effect.

If the Government's contention be correct, it would be incumbent upon the owner to follow each vessel

throughout its activities and to determine, at its peril, whether compensation under the requisition charter had accrued while the vessel was used as a merchant ship, in which case suit must have been filed in the District Court within two years, or while the vessel was used for any other purpose, in which case the suit must have been filed in the Court of Claims or the District Court under the Tucker Act but a period of six years would be allowed within which to institute action. Not only would the owner be required to determine this question at its peril; it would also be required to segregate and allocate compensation and charges proportionately to the periods during which a ship was and was not employed as a merchant ship. Thus, advances for which the shipowner would be entitled to reimbursement (R., 19, 22) would necessarily be allocated between such times as the vessel was actually engaged as a merchant ship and other times when it was not so engaged. And how would such an allocation be made? If it could be made, the result would follow that, as to a portion of such a claim, suit must be instituted in one court with one limitation and as to the remainder in another court with another limitation.

The decision in *Johnson* v. *United States* was principally based upon the policy of establishing substantial uniformity as to venue, service of process, rules of decision and procedure, rate of interest and period of limitation, but if the respondent's construction of the Suits in Admiralty Act were adopted, that policy would be entirely defeated so that confusion and un-

certainty would prevail, with reference, not only to the forum and the period of limitation, but also to the substantial rights of the parties.

It is settled that a claim such as the petitioner's in this case is not one which bears interest because it is a claim for just compensation defined by contract.

New York & Porto Rico Steamship Co. v. *United States*, 29 Fed. (2d) 1014;

Atlantic Refining Co. v. *United States*, 69 Ct. Cl. 713 (certiorari denied, 282 U. S. 859).

But the petitioner would be entitled to interest at 4 per cent if the suit were one under the Suits in Admiralty Act. (Section 3, *infra*, p. 54.)

United States v. *Certain Freights*, 4 Fed. (2d) 132 (D. C. Mass.);

Emergency Fleet Corporation v. *Florida Grain and Elevator Co.*, 20 Fed. (2d) 583, 586 (C. C. A. 5, 1927);

Smith v. *Emergency Fleet Corporation*, 26 Fed. (2d) 337, 339.

To the extent that the shipowner's right would be enforceable in the Court of Claims or the District Court under the Tucker Act, it would not be entitled to costs against the United States (19 Stats. 344 C. 105, U. S. C., Title 28, Sec. 283). But to the extent that the shipowner's rights would be enforceable under the Suits in Admiralty Act the shipowner would be entitled to costs.

James Shewan and Sons, Inc. v. *United States*, 267 U. S. 86.

The rights of the shipowner are based upon the seizure and are defined in the "requisition charter" and the rights of the parties must be determined by reference to that contract. Nevertheless, the Government asserts that the forum, the period of limitation and the rules of legal procedure are dependent, not upon the provisions of the agreement, but upon the whim of the Board in the use to which the vessel might from time to time have been devoted. Upon the respondent's theory, the "requisition charter" would entitle the owner to interest and costs in a suit for compensation which accrued while the vessel might be in the merchant service, but the same "requisition charter" would not entitle the owner to interest or costs in a suit for such portion of the just compensation or hire as accrued while the vessel might be in the governmental service. In other words, the shipowner's rights would be dependent, not upon the contract, but solely upon the use to which the vessel might be devoted in the exclusive discretion of the Board and upon the Board's whim and caprice.

This construction would not lead to uniformity but to confusion, inconsistency and inconvenience and nothing in the language of the Suits in Admiralty Act can be found to justify it.

Where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain. *United States* v. *Fisher*, 2 Cranch, 358, 386.

Reasonably construed the Suits in Admiralty Act applies only to those maritime causes which are peculiar to and connected solely with the employment

of vessels as merchant ships and, so construed, the Act affords no remedy to enforce a "requisition charter."

V. The jurisdiction at law of claims upon "requisition charters" is supported by a long course of decisions.

Although the Suits in Admiralty Act was adopted in 1920 and numerous claims have been pressed against the United States since that time upon these requisition charters, the United States now, when but few such matters remain to be settled, urges for the first time that such an action as this is governed by the Suits in Admiralty Act. Claims in connection with which "requisition charters" have been made have heretofore frequently been heard and determined by the Court of Claims or by the District Court under the provisions of the Tucker Act.

Huron Navigation Corp. v. *United States,* 60 Ct. Cls., 770 (1925) (Appeal dismissed, 273 U. S. 777);

Atlantic Refining Co. v. *United States,* 69 Ct. Cls., 713 (1930). (Certiorari denied, 282 U. S. 859);

Olympia Shipping Corporation v. *United States,* 71 Ct. Cl., 251 (1930);

Ore Steamship Co. v. *United States,* No. D-660, Ct. Cls. (unreported);

Standard Oil v. *United States,* 61 Ct. Cls., 951 (1926);

Standard Transportation Co. v. *United States,* 61 Ct. Cls., 906 (1926).

In the District Court the very question raised in this case by the United States upon the merits was heard

under the Tucker Act and determined adversely to the United States. *New York & Porto Rico Steamship Co.* v. *United States,* 29 Fed. (2d) 1013, and the decree in that case was affirmed in the Circuit Court of Appeals, 29 Fed. (2d) 1014 (C. C. A., 2, 1428).

It is difficult to believe that each of the many judgments rendered under the Tucker Act in connection with the so-called requisition charters is void. It was the duty of the court in each of these cases to satisfy itself of its jurisdiction. In the light of that duty the authorities abundantly and numerously support the contention of the petitioner.

It could not have occurred to the respondent until January 13, 1930, when its motion to dismiss was filed in this proceeding, that any question as to the jurisdiction of the Court of Claims existed. The petition in this action was filed on April 6, 1927, within six months after the claim of the shipowner had accrued (R., 13). Had it then been urged that the shipowners' remedy was solely under the Suits in Admiralty Act the shipowner would have had ample time to protect itself by the institution of proceedings in admiralty, but when the motion to dismiss was filed, the two-year limitation prescribed by the Suits in Admiralty Act had elapsed. We cannot believe that respondent would have deliberately awaited the expiration of the limitation contained in the Suits in Admiralty Act before urging at this Court that the proceedings should have been instituted in the District Court in Admiralty, thereby depriving the shipowner, if the government should succeed upon its motion, of any remedy whatever in connection with a matter where the liability of

the respondent is now settled. *The Brazos,* 29 Fed. (2d) 1013, affirmed in 29 Fed. (2d) 1014.

We submit that the Suits in Admiralty Act affords the shipowner no remedy whatever and that jurisdiction of the cause is in the Court of Claims under the Tucker Act for the following reasons:

1. The "requisition charters" are non-maritime;

2. The action is one upon the balance of an account and is properly brought at law *in assumpsit;*

3. The "requisition charters" do not arise out of the ownership, possession or operation of vessels as merchant ships;

4. The jurisdiction of this cause at law is settled by judicial precedent.

Respectfully submitted,

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APPENDIX.

The Act of March 3, 1887, c. 359, 24 Stat. 505 (U. S. C. Title 28, Sec. 250) provides in part as follows (as does also Section 145 of the Judicial Code, 36 Stat. 1087, 1136):

> * * * That the Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable; * * *

Section 2 of the 1887 Act conferred concurrent jurisdiction upon the district courts and circuit courts, on claims of certain limited amounts.

The Twentieth Clause of Section 24 of the Act of March 3, 1911, c. 231, 36 Stat. 1087, 1093 (U. S. C. Title 28, Sec. 41 (20)) confers upon the district courts jurisdiction concurrent with the Court of Claims in respect of claims not exceeding ten thousand dollars.

Section 154 of the Judicial Code, c. 231, 36 Stat. 1087, 1138 (U. S. C., Title 28, Sec. 260), provides:

> No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any

other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

The Urgent Deficiencies Act of June 15, 1917, c. 29, 40 Stat. 182, 183, provided in part as follows:

Emergency Shipping Fund.

1. The President is hereby authorized and empowered, within the limits of the amounts herein authorized—(*e*) to purchase, requisition or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

2. Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or materials so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material, or plant of such person or any part thereof without taking possession of the entire plant and may use the same at such times and in such manner as he may consider necessary or expedient.

3. Whenever the United States shall cancel, modify, suspend, or requisition any contract, make use of, assume, occupy, requisition, acquire, or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

4. The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time.

Provided, That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct.

The Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525, 526, 527, 528 (U. S. C., Title 46, Secs. 741, 742, 745, 749), provides in part:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress

assembled, That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock, or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tug boat operated by such corporation. Such suits shall be brought in the District Court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States

or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

SEC. 3. That such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. A decree against the United States or such corporation may include costs of suit, and when the decree is for a money judgment, interest at the rate of 4 per centum per annum until satisfied, or at any higher rate which shall be stipulated in any contract upon which such decree shall be based. Interest shall run as ordered by the court. Decrees shall be subject to appeal and revision as now provided in other cases of admiralty and maritime jurisdiction.

SEC. 4. That if a privately owned vessel not in the possession of the United States or of such corporation is arrested or attached upon any cause of action arising or alleged to have arisen from previous possession, ownership, or operation of such vessel by the United States or by such corporation, such vessel shall be released without bond or stipulation therefor upon the suggestion by the United States, through its Attorney General or other duly authorized law officer, that it is interested in such cause, desires such release, and assumes the liability for the satisfaction of any decree obtained by the libelant in such cause, and thereafter such cause shall proceed against the United States in accordance with the provisions of this Act.

SEC. 6. That the United States or such corporation shall be entitled to the benefits of all exemptions and of all limitations of liability accorded by law to the owners, charterers, operators, or agents of vessels.

SEC. 7. That if any vessel or cargo within the purview of sections 1 and 4 of this Act is arrested, attached, or otherwise seized by process of any court in any country other than the United States, or if any suit is brought therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage, or ownership of any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the United States Shipping Board, or such corporation as by said court required, for the release of such vessel or cargo, and for the prosecution of any appeal; or may, in the event of such suits against the master of any such vessel, direct said United States consul to enter the appearance of the United States, or of the United States Shipping Board, or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit.

SEC. 9. That the Secretary of any department of the Government of the United States, or the United States Shipping Board, or the board of trustees of such corporation, having control of the possession or operation of any merchant vessel are, and each hereby is, authorized to arbitrate, compromise, or settle any claim in which suit will lie under the provisions of Sections 2, 4, 7, and 10 of this Act.

The Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 998, 989 (U. S. C. Title 46, Sec. 862) provides in part:

Sec. 2. (*a*) That the following Acts and parts of Acts are hereby repealed, subject to the limitations and exceptions hereinafter, in this Act, provided:

(1) The emergency shipping fund provisions of the Act entitled "An Act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes," approved June 15, 1917, as amended by the Act entitled "An Act to amend the emergency shipping fund provisions of the Urgent Deficiency Appropriation Act, approved June 15, 1917, so as to empower the President and his designated agents to take over certain transportation systems for the transportation of shipyard and plant employees, and for other purposes," approved April 22, 1918, and as further amended by the Act entitled "An Act making appropriation to supply deficiencies in appropriations for the fiscal year ending June 30, 1919, and prior fiscal years, on account of war expenses, and for other purposes," approved November 4, 1918.

(2) Section 3 of the such Act of April 22, 1918;

(3) The paragraphs numbered 2 and 3 under the heading "Emergency shipping fund" in such Act of November 4, 1918; and

(4) The Act entitled "An Act to confer on the President power to prescribe charter rates and freight rates and to requisition vessels, and for other purposses," approved July 18, 1918.

(5) Sections 5, 7, and 8, Shipping Act, 1916.

(*b*) The repeal of such Acts or parts of Acts is subject to the following limitations:

(1) All contracts or agreements lawfully entered into before the passage of this act under any such act or part of act shall be assumed and carried out by the United States Shipping Board, hereinafter called "the board."

(2) All rights, interests, or remedies accruing or to accrue as a result of any such contract or agreement or of any action taken in pursuance of any such act or parts of acts shall be in all respects as valid, and may be exercised and enforced in like manner, subject to the provisions of subdivision (*c*) of this section, as if this Act had not been passed.

(3) The repeal shall not have the effect of extinguishing any penalty incurred under such Acts or parts of Acts, but such Acts or parts of Acts shall remain in force for the purpose of sustaining a prosecution for enforcement of the penalty therein provided for the violation thereof.

(4) The board shall have full power and authority to complete or conclude any construction work begun in accordance with the provisions of such Acts or parts of Acts if, in the opinion of the board, the completion or conclusion thereof is for the best interests of the United States.

(*c*) As soon as practicable after the passage of this Act the board shall adjust, settle, and liquidate all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President by any such Act or parts of Acts; and for this purpose the board, instead of the President, shall have and

exercise any of such powers and duties relating to the determination and payment of just compensation: *Provided*, That any person dissatisfied *with any decision* of the board shall have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the Acts hereby repealed.

FILE COPY

No. 137

In the Supreme Court of the United States

October Term, 1941

MATSON NAVIGATION COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (R. 37–40) has not yet been reported.

JURISDICTION

The judgment sought to be reviewed was entered on May 11, 1931. (R. 40.) The petition for a writ of certiorari was filed on June 5, 1931. (R. 40.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 154 of the Judicial Code deprives the Court of Claims of jurisdiction when immediately after the institution of the suit in the Court of Claims proceedings are brought against the United States in a District Court on the same causes of action.

2. Whether the Court of Claims had jurisdiction of a suit brought against the United States by the owner of merchant vessels for payments alleged to be due under requisition charters of the vessels while they were operated for the United States. The suit was brought after the enactment of the Suits in Admiralty Act of March 9, 1920, and the cause of action arose after April 6, 1917 (the date mentioned in Section 5 of that Act).

STATUTES INVOLVED

These are printed in the Appendix, pp. 8–10, *infra*.

STATEMENT

The Court of Claims rendered judgment in favor of the United States upon a motion to dismiss the action for lack of jurisdiction under Section 154 of the Judicial Code, p. 8, *infra*. The petition alleged that in October, 1917, the United States requisitioned seven vessels belonging to the petitioner, and that in December, 1917, the petitioner and the United States executed seven requisition charters

which provided that the owner should operate the vessels for the United States and the United States would pay the petitioner for the use of each vessel at a monthly rate, and, in addition, would reimburse the petitioner for any proper increases over a certain standard of wages and bonuses to masters, officers, and crew. (R. 8, 9.) This suit was brought April 6, 1927, to recover certain increases in wages and bonuses alleged to have been made under these requisition charters.

The Court of Claims found that on April 7, 1927, the petitioner filed in the District Court for the Southern District of California seven suits against the United States on the seven requisition charters pleaded in the petition in the Court of Claims, seeking to recover for the increases in wages and bonuses alleged to have been made. (R. 36.) These suits are now pending in the District Court. (R. 37.)

ARGUMENT

Petitioner contends that Section 154 of the Judicial Code has no bearing on the instant case, for the reason that by its terms it deprives the Court of Claims of jurisdiction only when there is pending in another court a suit brought by the same plaintiff on the same cause of action against—

> any person who * * * was * * * acting or professing to act * * * under the authority of the United States.

Petitioner further contends that the statute was designed to protect the Government only in cases where the doctrine of *res adjudicata* could not be invoked, and that where, as in the instant case, both suits are against the United States, ample protection is afforded by the rule permitting abatement of the second action pending a determination of the first.

With respect to the purpose of the statute, the Court of Claims said (R. 39):

> The whole object and intent of the act of 1868 were to prevent the Government from being sued in separate jurisdictions on the same cause of action and to make the plaintiff elect in which court to sue. The act not only prohibits the filing but also the prosecution of any claim in the Court of Claims when another suit on the same cause of action is pending in another court. The seven suits in the District Court of California were filed one day after the suit was filed in this court, but the plaintiff is now attempting to prosecute the suit in this court while the suits in the district court are pending. This is prohibited under the statute. *Corona Coal Company* v. *The United States*, 263 U. S. 537.

We believe that it is doubtful whether this decision of the Court of Claims is correct. The question seems never to have been squarely decided before, and we should be disinclined to oppose the

petition if it would be necessary to decide this question upon a review of the case.

But we submit that the action should have been dismissed for want of jurisdiction because of other considerations.

The suit is for reimbursement under the terms of certain requisition charters of bonuses and wage increases paid by the petitioner or, as worded in the petition (R. 13):

> * * * sums claimed by the claimant to be due to it from defendant pursuant to said provision contained in each of said requisition charters that the defendant would pay to the claimant as additional compensation for the use of said vessels, all sums paid by the claimant for any proper increases in wages and bonuses over the standard prevailing August 1, 1917, for master, officers and crew.

The suit is not one for just compensation for requisition, for the contract was accepted in lieu of compensation. It is a suit upon a maritime contract. On such a contract a proceeding in admiralty could be maintained in the District Courts. *The Nellie T,* 235 Fed. 117 (C. C. A. 2d); *Dunbar* v. *Weston,* 93 Fed. 472 (N. D. N. Y.); *The Arlyn Nelson,* 243 Fed. 415 (W. D. Wash.); *United Fruit Co.* v. *Fleet Corporation,* 42 F. (2d) 222 (D. C. Mass.); *Norton* v. *Southern Railway Co. et al.,* 246 N. Y. S. 676; Benedict on Admiralty (5th ed.), sec. 96.

Under Sections 1 and 2 of the Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525, 526 (U. S. C., Title 46, Secs. 741, 742) (p. 8–10, *infra*), this remedy is exclusive. *Johnson* v. *Fleet Corporation,* 280 U. S. 320. We submit, therefore, that the Court of Claims was without jurisdiction of the suit for this reason.

Substantially this same point is raised in the Government's pending petition for certiorari to the Court of Claims in *United States* v. *Olympia Shipping Corporation,* No. 85, Oct. Term, 1931.

CONCLUSION

We contend that the Court of Claims should have dismissed the action for want of jurisdiction on the ground that the sole remedy of the petitioner was in the District Court under the Suits in Admiralty Act. This point was not considered by the court below. It is raised in the Government's pending petition for certiorari in *United States* v. *Olympia Shipping Corporation,* No. 85, Oct. Term, 1931. We suggest that action upon the present petition might well be deferred until a final decision in the *Olympia Shipping* case. If our petition in that case is granted and our contention therein is sustained after hearing on the merits, there will be no occasion to grant the petition in the instant case. But if that petition should be denied, or if, after a hearing in this Court, the respondent in that case should prevail, we would not oppose the issu-

ance of the writ in the instant case in order to obtain a review of the decision as to the effect of Section 154 of the Judicial Code.

Respectfully submitted.

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AUGUST, 1931.

APPENDIX

Section 154 of the Judicial Code, c. 231, 36 Stat. 1087, 1138 (U. S. C., Title 28, Sec. 260), provides:

> No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

The Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525, 526 (U. S. C., Title 46, Sec. 741, provides in part:

> That no vessel owned by the United States or by any corporation in which the United States or its representative shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.

SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

* * * * *

SEC. 5. That suits as herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits

based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises.

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FILE COPY

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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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OPINION BELOW

The opinion of the Court of Claims (R. 37–40) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on May 11, 1931. (R. 40.) The petition for a writ of certiorari was filed June 5, 1931 (R. 40), and the writ was granted on October 12, 1931 (R. 41). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether Section 154 of the Judicial Code deprives the Court of Claims of jurisdiction in view of the fact that immediately after the institution of the suit in the Court of Claims proceedings were brought against the United States in a District Court on the same causes of action.

2. Whether the Suits in Admiralty Act deprives the Court of Claims of jurisdiction of a suit brought against the United States by the owner of merchant vessels for reimbursement for increases in wages paid by the owner to crews of the vessels, the claim for reimbursement being based upon a provision in time charters, by the terms of which the vessels, which had been requisitioned, remained in the service of the United States and were operated for the United States by the owner.

STATUTES INVOLVED

These are printed in the Appendix, *infra,* pp. 23–29.

STATEMENT

The Court of Claims sustained a motion to dismiss a petition setting forth the following facts:

On October 15, 1917, the United States Shipping Board, acting under authority of the Act of June 15, 1917, and an Executive Order promulgated by the President on July 11, 1917, requisitioned for use by the United States, seven ships then owned and operated by petitioner. (R. 8.) On December 29, 1917, the Government, acting through the Shipping

Board, entered into seven separate requisition charters with petitioner covering the ships thus requisitioned. (R. 8.) These charters recited that the parties desired to fix the compensation to be paid by the United States for the use of the ships requisitioned and that it was "agreed as follows," *inter alia:*

> In consideration of the compensation provided and the other obligations assumed by the United States hereunder, the owner accepts this Requisition Charter in full satisfaction of any and all claims he has or may have against the United States arising out of the Requisition and accepts the compensation herein provided for as the just compensation required by law; provided, however, that the acceptance of this Requisition Charter shall be without prejudice to the claim, if any, the owner may have against the United States arising out of recoveries against the owner by third parties on the vessel's commitments. (R. 16.)

There was attached to each charter, and made a part thereof, a so-called "Time Form" which defined the respective rights and duties of the parties in connection with the use and operation of the vessel requisitioned. (R. 17–30.) It provided that the vessel should remain in the service of the United States to be employed as the United States might determine, within certain limits, and that petitioner should operate the vessel for the United States, should furnish crew and necessary equip-

ment, and should pay for provisions, wages, shipping fees, and the requisite supplies. (R. 17, 18.) The United States agreed to provide and pay for fuel, port charges, commissions, brokerage and certain other items (R. 19), and also to pay for the use of the vessels at a monthly rate to be established from time to time by the Shipping Board (R. 20). In addition to the aforesaid compensation the Government by the tenth clause agreed to reimburse the owner "for any proper increase in wages and bonuses over the standard prevailing 1 August, 1917, for masters, officers, and crew." (R. 21.)

This time form contained thirty-eight separate paragraphs covering a great variety of matters, including such as are commonly covered by a time charter of a vessel. (R. 17–30.)

Subsequently petitioner and the United States entered into two contracts whereby the petitioner agreed to manage and operate on behalf of the Government certain other ships which were then in the possession of the Shipping Board. (R. 9, 10.) For services so rendered petitioner was to receive compensation at rates to be fixed from time to time by the Shipping Board. (R. 10.)

Up until October 18, 1926, petitioner from time to time charged to the Government upon its books the sums due as agreed compensation for the use of vessels under the requisition charters, including sums paid by petitioner to the masters, officers, and crews of the requisitioned vessels for alleged proper

increases in wages and bonuses over the rates prevailing August 1, 1917. (R. 10.) Petitioner also charged to the Government sums due for services rendered pursuant to the management and operating agreements referred to in the previous paragraph. (R. 10.) All of these items were carried by petitioner in a single account which petitioner alleges constituted a mutual, current, and running account between petitioner and the Government. (R. 10, 11.) There were included in this account moneys received by petitioner on behalf of the United States under the management and operating agreements. (R. 10.)

On October 18, 1926, petitioner entered into an agreement with the Government with respect to settlement of all claims arising out of the requisition charters and management and operating agreements. (R. 13.) This agreement provided that petioner should accept the sum of $134,722.67 in full satisfaction of all claims which it had against the Government with the exception of a claim for $49,373.11 alleged to have been paid by petitioner because of increases in wages and bonuses. (R. 14, 31, 32, 33.) Petitioner expressly reserved the right to assert a claim for the item last mentioned. (R. 14, 32, 33.)

The sum of $134,722.67 was paid to petitioner concurrently with the execution of the agreement of October 18, 1926. (R. 14.) This suit was brought to recover the sum of $49,373.11, alleged to be due

under the tenth clause of the "Time Form" annexed to the requisition charters.

The Court of Claims specially found that on April 7, 1927, the day after the petition was filed in the Court of Claims, the petitioner filed in the District Court of the United States for the Northern District of California seven separate suits against the United States on the same causes of action sued on in the Court of Claims, and that those cases were pending in the District Court when the Court of Claims rendered its opinion. (R. 36–37.) The Court of Claims sustained the defendant's motion to dismiss the cause, holding that under the circumstances Section 154 of the Judicial Code (pp. 23–24, *infra*) deprived it of jurisdiction. (R. 38–40.) It did not discuss any other point.

SUMMARY OF ARGUMENT

I. The Government presents no argument with respect to the applicability of Section 154 of the Judicial Code to the present action. This question is fully discussed in petitioner's brief and in the opinion of the Court of Claims. We submit the question upon the opinion of that court.

II. Petitioner's claim is founded upon the tenth clause of the "Time Form" attached to the requisition charters. This was a maritime cause of action arising out of the operation of vessels upon which a proceeding might have been brought in admiralty. The vessels in question were operated for the

United States as merchant vessels at the time when the transactions out of which this claim arises took place. Petitioner's cause of action, if any, is therefore within the purview of the Suits in Admiralty Act; and under the decision of this Court in *Johnson* v. *Fleet Corporation*, 280 U. S. 320, the Court of Claims was without jurisdiction.

The Merchant Marine Act of 1920 confers upon the Court of Claims no jurisdiction which it would not otherwise have. That Act merely transferred to the Shipping Board the powers and duties which were imposed upon the President by the Act of June 15, 1917, and preserved to the owners of requisitioned vessels all remedies which they had prior to the repeal of the Act of June 15, 1917. These remedies, when founded upon maritime contracts, were limited by the Suits in Admiralty Act, and the Merchant Marine Act did not purport to remove that limitation.

ARGUMENT

I

DOES SECTION 154 OF THE JUDICIAL CODE DEPRIVE THE COURT OF CLAIMS OF JURISDICTION TO HEAR AND DETERMINE THIS CLAIM?

The Court of Claims specially found (R. 36) that on the day following the commencement of this action in the Court of Claims petitioner filed seven separate suits against the United States in the United States District Court for the Northern District of California on the causes of action here

alleged. The Court of Claims dismissed the petition on the ground that by reason of the pendency of the actions in the District Court the provisions of Section 154 of the Judicial Code deprived it of jurisdiction.

Section 154 (*infra*, pp. 23–24) in terms relates only to suits brought in the Court of Claims while another action is pending against any person acting or purporting to act under the authority of the United States. Petitioner contends that it can not be extended by implication to suits pending not against an agent of the Government but against the Government itself.

The issue involved is fully discussed in petitioner's brief. We submit the question on the opinion of the court below.

II

The Suits in Admiralty Act Deprives the Court of Claims of Jurisdiction Over the Cause of Action Set Forth in the Petition

The Government contends that petitioner's cause of action, if any, is covered by the Suits in Admiralty Act and that the Court of Claims was therefore without jurisdiction to entertain the suit. This contention was not adverted to in the opinion of the lower court, and petitioner now takes the position (Brief, pp. 1, 13) that the record here presents only the issue relating to Section 154 of the Judicial Code, and the brief which it has filed does not discuss any other point.

It is, however, clear that the applicability of the suits in Admiralty Act is now open to consideration. This matter goes to the jurisdiction of the Court of Claims. Even if the matter had not been raised by the defendant below, the Court of Claims should have dismissed the case for lack of jurisdiction on this ground (if there was no other ground for dismissing the case and the Suits in Admiralty Act was applicable). See *Johnson* v. *Fleet Corporation,* 280 U. S. 320, 327, *supra; Gainesville* v. *Brown-Crummer Co.,* 277 U. S. 549, 559.

The motion to dismiss alleged merely that the court was "without jurisdiction to hear and determine" the cause, not specifying any precise ground. (R. 35.) The contention based upon the Suits in Admiralty Act was presented to the Court of Claims by the Government in oral argument and also in its supplemental brief in support of the motion to dismiss. The point was discussed in the plaintiff's reply brief. Moreover, the Government in its brief in opposition to the petition for certiorari argued that the action should have been dismissed for want of jurisdiction on this ground.

If the point is well taken the judgment below was correct and must be affirmed. *Langnes* v. *Green,* 282 U. S. 531, 535–539.

The Suits in Admiralty Act (*infra,* pp. 26–27), provides, in part:

> That no vessel owned by the United States * * * or operated by or for the United States * * * shall hereafter, in view of the provision herein made for a libel *in personam,* be subject to arrest or seizure by judicial process in the United States or its possessions. * * *
>
> SEC. 2. That in cases where, if such vessel were privately owned or operated * * * a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel *in personam* may be brought against the United States, * * * provided such vessel is employed as a merchant vessel. * * *. Such suit shall be brought in the district court of the United States. * * *

In *Johnson* v. *Fleet Corporation,* 280 U. S. 320, 326, 327, this Court said that the Suits in Admiralty Act—

> furnishes the exclusive remedy in admiralty against the United States * * * on maritime causes of action arising out of the possession and operation of merchant vessels,

and that—

> the remedies given by the Act are exclusive in all cases where a libel might be filed under it.

The Act contains no mention of the Court of Claims, and it is clear from the opinion in the *Johnson* case that the Act excludes resort to the Court of Claims in cases which it covers.

Consequently, it is necessary to consider only whether the present suit was on a maritime cause of action arising out of the possession or operation of merchant vessels for which a proceeding in admiralty could have been maintained against the United States. We submit that the suit falls within this classification.

A. PETITIONER'S CLAIM IS ON A MARITIME CAUSE OF ACTION ARISING OUT OF THE OPERATION OF VESSELS UPON WHICH A PROCEEDING IN ADMIRALTY COULD HAVE BEEN MAINTAINED

It is well settled that a charter party is a maritime contract and that a suit on one of its provisions relating to a maritime matter is a suit upon a maritime cause of action over which admiralty has jurisdiction. *Morewood* v. *Enequist,* 23 How. 491; *Dunbar* v. *Weston,* 93 Fed. 472 (N. D. N. Y.); *The Nellie T.,* 235 Fed. 117 (C. C. A. 2d); *The Arlyn Nelson,* 243 Fed. 415 (W. D. Wash.).

In the court below the petitioner argued that its claim was not based upon a maritime contract, as the so-called requisition charter related primarily to the fixing of just compensation, and that by it no ship was let, as it had already been requisitioned. The petitioner argued further that even if the charters were in part maritime, admiralty would have no jurisdiction because of the principle that admiralty is without jurisdiction over contracts which are in part maritime and in part nonmaritime. We submit that these contentions are unsound or inapplicable to the facts of this case.

What the petitioner is suing for here is not the just compensation to which it was entitled by virtue of the taking of the vessels and for which the Urgent Deficiencies Act of June 15, 1917 (pp. 24–25, *infra*), provided it might sue in the Court of Claims. Whatever circumstances impelled the petitioner to enter into the requisition charters could not alter the fact that the charters were agreements essentially maritime in their nature and that suits on causes of action arising from such agreements may be maintained in admiralty. The charters recited that the petitioner accepted them in full satisfaction of claims against the United States arising out of the requisition. They contained provisions such as are customarily found in time charters,[1] and also provided that the petitioner should operate the vessels for the United States, should furnish crews and the necessary equipment, and should pay for provisions, wages, shipping fees, and the requisite supplies. The charters related to the operation of ships upon navigable waters, and the item in dispute related to a matter which is essentially a maritime matter arising out of the operation of vessels, namely, the payment of a part of charter hire.[2]

---

[1] Cf. Forms 409 and 410 in 3 Benedict on Admiralty (5th Ed.) 82–96.

[2] Even if the requisition charters could be considered as primarily relating to a nonmaritime matter, it would seem that an action for a part of the stipulated charter hire would be cognizable in admiralty because this matter may be adjudicated separately. See *Compagnie Francaise* v. *Bonnasse*, 19 F. (2d) 777 (C. C. A. 2d), certiorari denied, 275 U. S. 551; *United Fruit Co.* v. *Fleet Corporation*, 42 F. (2d) 222, 224, *supra*.

While it is true that the sums payable to petitioner under the charters were accepted as the just compensation provided by law, the Act of June 15, 1917, made no provison for the recovery of an increase in wages or bonuses, and it is clear that any right that petitioner had to recover these items was entirely dependent upon the agreements. *New York & Porto Rico Steamship Co.* v. *United States,* 29 F. (2d) 1014 (C. C. A. 2d). See also *Luckenbach Steamship Co., Inc.,* v. *United States,* 299 Fed. 876 (S. D. N. Y.); *Luckenbach Steamship Co., Inc.,* v. *United States,* 42 F. (2d) 156 (C. C. A. 2d); *Pacific Mail Steamship Co.* v. *United States,* 59 C. Cls. 246.

In the *New York & Porto Rico Steamship Co. case, supra,* it was held that recovery under a requisition charter similar to that here involved did not include interest for the reason that the action was one founded upon an express contract rather than one for just compensation. See also *Olympia Shipping Corporation* v. *United States,* 71 C. Cls. 251, now pending in this Court upon the Government's petition for certiorari (October Term 1931, No. 85); *Atlantic Refining Co.* v. *United States,* 69 C. Cls. 713, certiorari denied, 282 U. S. 859.

The claimant relinquished its right to a judicial determination of just compensation and accepted in lieu thereof the Government's contractual obligation. Cf. *American Smelting & Refining Co.* v. *United States,* 259 U. S. 75.

In the court below petitioner contended that this could not be considered to be a suit upon a maritime cause of action because the petition alleged that it was brought to recover the unpaid balance of an open, current, mutual, and running account. This would seem to be entirely inconsistent with the argument that the suit is one for just compensation under the Act of June 15, 1917, and the Merchant Marine Act of 1920. In any event we are unable to agree with this view of the case.

The claim for increased wages and bonuses was expressly excluded from the settlement between petitioner and the Shipping Board. It never lost its identity by being merged in a general balance, but on the contrary was regarded as a distinct and separate item as to which petitioner's rights were expressly reserved.

Even if this be regarded as a suit upon a mutual account, the maritime nature of the action is not thereby destroyed. *Morse Dry Dock & Repairing Co.* v. *Munson Line,* 155 Fed. 150 (S. D. N. Y.), affirmed, 158 Fed. 1021 (C. C. A. 2d); *The Hattie Thomas,* 262 Fed. 943 (C. C. A. 2d); *The Castlewood,* 298 Fed. 184 (E. D. Pa.), affirmed, 5 F. (2d) 1013 (C. C. A. 3d). These were suits upon accounts stated and were held to be within the admiralty jurisdiction. The principle which they illustrate is equally applicable here.

Although we have been able to find no case discussing the nature of the provision involved here,

an action on similar provisions has been held to relate to maritime causes of action as to which the Suits in Admiralty Act furnishes the exclusive remedy. *United Fruit Co.* v. *Fleet Corporation* 42 F. (2d) 222 (D. Mass.).

In *N.S. Byonnes & Son Dampskibsrederi Aktieselskab* v. *United States,* 298 Fed. 123, 124 (S. D. N. Y.) it was said by way of *dictum* that the Suits in Admiralty Act was not intended to apply to owners of vessels "who had a contract on which they might sue in the Court of Claims or under the Tucker Act." Since this Court has held that the mere fact that a plaintiff has a contractual right against the Government does not permit him to sue under the Tucker Act if the cause of action is within the purview of the Suits in Admiralty Act, no weight can now be attached to this *dictum. Federal Sugar Refining Co.* v. *United States,* 280 U. S. 320.

In *Luckenbach Steamship Co.* v. *United States,* 299 Fed. 876, *supra,* a suit was brought in admiralty to recover under a requisition charter claims which the owner asserted against the United States "arising out of recoveries against the owner by third parties on the vessel's commitments." The petition was dismissed for failure properly to allege settlement by the Shipping Board, but leave to file an amended petition was granted, and there was no intimation of lack of admiralty jurisdiction.

In *Luckenbach Steamship Co.* v. *United States,* 42 F. (2d) 156, *supra,* the owner sued under the

Tucker Act to recover counsel fees and expenses incurred in defending a libel *in rem* filed while the ship was under requisition charter to the Government. Although the case was dismissed upon the merits, no question was raised as to the propriety of bringing such a suit under the Tucker Act.

In *New York & Porto Rico Steamship Co.* v. *United States,* 29 F. (2d) 1014, *supra,* the cause of action was exactly the same as in the instant case, suit being brought to recover increases in wages and bonuses under the provisions of a requisition charter. The suit was under the Tucker Act and the applicability of the Suits in Admiralty Act was not considered.

In a number of cases the Court of Claims has rendered judgment for plaintiffs in actions brought on requisition charters. Apparently the applicability of the Suits in Admiralty Act was not raised in any of these cases except the *Olympia Shipping Corporation* case, *supra.* There, after judgment was rendered, this question of jurisdiction was raised on a motion for a new trial, which the court overruled without opinion.

It has been argued that the Suits in Admiralty Act was intended to apply only to suits against the United States by third parties sustaining damages arising out of the operation of ships by or for the Government. This argument is apparently based

on the theory that the Act was designed solely to relieve the Government of the embarrassment of having its ships subjected to proceedings *in rem*. While this was undoubtedly the primary purpose of the Act, it has a distinctly broader application. In *Eastern Transportation Co.* v. *United States*, 272 U. S. 675, this Court held that the Act permitted suit *in personam* against the the Government in a case in which no action *in rem* could possibly have been brought. There is nothing in the Act which purports to confine its operation to suits by third parties or to exclude suits by the owners of vessels chartered to the Government. The opinions of this Court in *Fleet Corporation* v. *Rosenberg Brothers*, 276 U. S. 202, and *Johnson* v. *Fleet Corporation*, 280 U. S. 320, *supra*, indicate that the Suits in Admiralty Act applies to all maritime causes of action which arise out of the possession or operation of merchant vessels by or for the United States.

B. PETITIONER'S SHIPS WERE MERCHANT VESSELS OPERATED BY OR FOR THE UNITED STATES

The Suits in Admiralty Act authorizes libels *in personam* against the United States only in cases where the ships involved are employed as merchant vessels (or tugs, which are not here involved). This has been construed to mean that the vessel must have been owned or operated by or for the United States as a merchant vessel, as distinguished

from a public ship, when the transaction occurred out of which the alleged liability arose. *Shewan & Sons* v. *United States*, 266 U. S. 108; *Eastern Transportation Co.* v. *United States*, 272 U. S. 675.

The petition in the Court of Claims states that the petitioner was, at all times pertinent to the suit, engaged in the business of transporting passengers and goods between the Pacific Coast and the Hawaiian Islands and the vessels here involved were at all times operated in this traffic. (R. 7.) The third article of the time charters (R. 18) provides that the vessel while being operated by the owner under the charter, shall not have the status of a public ship but shall be subject to all laws and regulations governing merchant vessels. The same clause further provides that when the vessel is engaged in the service of the War or Navy Department it shall have the status of a public ship, and makes certain provisions for its operation under such circumstances; but it does not appear that this contingency ever occurred.

Petitioner has at no time contended that its vessels were ever employed by the United States in any capacity other than as merchant vessels, and we submit that the petition and exhibits annexed thereto sufficiently show that Section 2 of the Suits in Admiralty Act is satisfied in this respect.

That the vessels were being operated by or for the United States is obvious. The petition for certiorari states, "Each of the petitioner's vessels were to be operated by it for the United States." (R. 2.)

C. THE MERCHANT MARINE ACT OF 1920 DOES NOT CONFER JURISDICTION UPON THE COURT OF CLAIMS TO ENTERTAIN SUITS FOUNDED UPON MARITIME CAUSES OF ACTION

Petitioner contended in the court below that Section 2 (c) of the Merchant Marine Act of 1920 (*infra*, p. 28) conferred jurisdiction upon the Court of Claims even if that court did not otherwise have jurisdiction.

The Act repealed the emergency shipping fund provisions of the Act of June 15, 1917, and imposed upon the Shipping Board the duty of carrying out all contracts lawfully entered into under the Act repealed. It further provided that the Board should settle and liquidate all matters "arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President," reserving to any person dissatisfied with a decision of the Board "the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the Acts hereby repealed."

Under the Act of June 15, 1917, an owner whose ship had been requisitioned was entitled to sue for just compensation in the Court of Claims or in the District Courts under the Tucker Act. The execution of a requisition charter did not affect that jurisdiction up to the time of the enactment of the Suits in Admiralty Act, for the United States had by the earlier statutes (p. 23, *infra*), consented to be sued in those courts on contracts, maritime or other-

wise. The Suits in Admiralty Act did not disturb the jurisdiction of the Court of Claims over actions to determine just compensation, but it did, as we believe we have demonstrated, confer exclusive jurisdiction upon the District Courts with respect to suits of a maritime nature on requisition charters. It operated to modify the provisions of the earlier statutes, in respect of maritime causes of action. See *Federal Sugar Refining Co.* v. *United States,* 39 F. (2d) 254, 255, 256 (C. C. A. 2d); 280 U. S. 320.

There is nothing in the Merchant Marine Act inconsistent with the Government's position. That Act, after repealing the Act of June 15, 1917, gave owners the same right to sue which they would have had if the provisions of the Act of 1917 had not been repealed. If we are correct in our contention that the right to sue on a requisition charter was limited by the Suits in Admiralty Act, we submit that the Merchant Marine Act did not purport to remove that limitation. It merely preserved to owners the right to sue for just compensation and did not enlarge their remedies for the enforcement of maritime obligations. But see *Luckenbach Steamship Co.* v. *United States,* 42 F. (2d) 156, *supra.*

The claim in the instant case is based upon the tenth article of the time charter. The suit does not relate to the ascertainment of just compensation but only to the effect of the written agreement. The Act of June 15, 1917, did not commit any ques-

tion arising under such an agreement to the President for decision; but the ninth section of the Suits in Admiralty Act (*infra*, p. 27), vested in the Shipping Board authority to "arbitrate, compromise, or settle" any claims within the provisions of that Act. Section 2 (*c*) of the Merchant Marine Act (p. 28, *infra*) applies to remedies only on claims which the President had the right to decide. As the President never had jurisdiction over claims like that here involved, the Merchant Marine Act is inapplicable. See *Fleet Corporation* v. *Harwood*, 281 U. S. 519, 527.

Petitioner contended in the court below that the Merchant Marine Act is applicable to the instant case because the cause of action is one "arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President" by the repealed Act. But the Act of June 15, 1917, empowered the President to direct the management, operation, and disposal, not only of ships requisitioned, but also of ships constructed or purchased. It would seem to follow that if all matters "arising out of or incident to" the management or operation of requisitioned vessels were under the direction of the President and hence within the jurisdiction of the Court of Claims, then all matters "arising out of or incident to" the management or operation of constructed and purchased vessels are likewise within the same jurisdiction. But this is not true with respect to matters of a maritime nature because such matters are excluded from the juris-

diction of the Court of Claims by the Suits in Admiralty Act. *Federal Sugar Refining Co.* case, *supra.* It is therefore apparent that the Merchant Marine Act does not confer upon the Court of Claims jurisdiction over causes of action which are within the purview of the Suits in Admiralty Act, and if the instant case would otherwise be cognizable only in admiralty the Merchant Marine Act has no application thereto.

Merely to save the point, we wish to say that some doubt arises as to the jurisdiction of the Court of Claims because the suit may have been barred by the six-year statute of limitations. The question was not passed upon by the court below and is not presented upon the pleadings or by the findings and need not be discussed here.

CONCLUSION

We submit that the action of the Court of Claims in dismissing the case should be affirmed on the ground that the Suits in Admiralty Act deprived it of jurisdiction.

Respectfully submitted.

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DECEMBER, 1931.

APPENDIX.

The Act of March 3, 1887, c. 359, 24 Stat. 505 (U. S. C. Title 28, Sec. 250) provides in part as follows (as does also Section 145 of the Judicial Code, 36 Stat. 1087, 1136):

> * * * That the Court of Claims shall have jurisdiction to hear and determine the following matters:
>
> First. All claims founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable; * * *

Section 2 of the 1887 Act conferred concurrent jurisdiction upon the district courts and circuit courts, on claims of certain limited amounts.

The Twentieth Clause of Section 24 of the Act of March 3, 1911, c. 231, 36 Stat. 1087, 1093 (U. S. C. Title 28, Sec. 41 (20)) confers upon the district courts jurisdiction concurrent with the Court of Claims in respect of claims not exceeding ten thousand dollars.

Section 154 of the Judicial Code, c. 231, 36 Stat. 1087, 1138 (U. S. C., Title 28, Sec. 260), provides:

> No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in

respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

The Urgent Deficiencies Act of June 15, 1917, c. 29, 40 Stat. 182, 183, provided in part as follows:

EMERGENCY SHIPPING FUND

The President is hereby authorized and empowered, within the limits of the amounts herein authorized—

* * * * *

(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States any ship now constructed or in the process of construction or hereafter constructed, or any part thereof, or charter of such ship.

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the

President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter, or material, in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof, so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph twenty, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time: *Provided,* That all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the

United States, shall be managed, operated, and disposed of as the President may direct.

The Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525, 526, 527, 528 (U. S. C., Title 46, Secs. 741, 742, 745, 749), provides in part:

> That no vessel owned by the United States or by any corporation in which the United States or its representatives shall own the entire outstanding capital stock or in the possession of the United States or of such corporation or operated by or for the United States or such corporation, and no cargo owned or possessed by the United States or by such corporation, shall hereafter, in view of the provision herein made for a libel in personam, be subject to arrest or seizure by judicial process in the United States or its possessions: *Provided,* That this Act shall not apply to the Panama Railroad Company.
>
> SEC. 2. That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the

United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.

* * * * *

SEC. 5. That suits as herein authorized may be brought only on causes of action arising since April 6, 1917, provided that suits based on causes of action arising prior to the taking effect of this Act shall be brought within one year after this Act goes into effect; and all other suits hereunder shall be brought within two years after the cause of action arises.

* * * * *

SEC. 9. That the Secretary of any department of the Government of the United States, or the United States Shipping Board, or the board of trustees of such corporation, having control of the possession or operation of any merchant vessel are, and each hereby is, authorized to arbitrate, compromise, or settle any claim in which suit will lie under the provisions of sections 2, 4, 7, and 10 of this Act.

The Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988, 989 (U. S. C. Title 46, Sec. 862) provides in part:

SEC. 2. (a) That the following Acts and parts of Acts are hereby repealed, subject to

the limitations and exceptions hereinafter, in this Act, provided:

(1) The emergency shipping fund provisions of the Act entitled "An Act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June 30, 1917, and for other purposes," approved June 15, 1917, as amended * * *.

* * * * *

(b) The repeal of such Acts or parts of Acts is subject to the following limitations:

(1) All contracts or agreements lawfully entered into before the passage of this Act under any such Act or part of Act shall be assumed and carried out by the United States Shipping Board, hereinafter called "the board."

(2) All rights, interests, or remedies accruing or to accrue as a result of any such contract or agreement or of any action taken in pursuance of any such Act or parts of Acts shall be in all respects as valid, and may be exercised and enforced in like manner, subject to the provisions of subdivision (c) of this section, as if this Act had not been passed.

* * * * *

(c) As soon as practicable after the passage of this Act the board shall adjust, settle, and liquidate all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President by any such Act or parts of Acts; and for this purpose the board, instead of the President, shall have and exercise any of such powers and duties relating to the determination and pay-

ment of just compensation: *Provided*, That any person dissatisfied with any decision of the board shall have the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the Acts hereby repealed.

* * * * *

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JAN 25 1932
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 137

MATSON NAVIGATION COMPANY, A CORPORATION,
PETITIONER,

vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR REHEARING.

HERMAN PHLEGER,
MAURICE E. HARRISON,
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Of Counsel.

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MATSON NAVIGATION COMPANY, A CORPORATION,
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vs.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR REHEARING.

To the Honorable the Supreme Court of the United States:

The petitioner respectfully requests a rehearing of this cause upon the ground that in its decision this Court has extended the admiralty and maritime jurisdiction beyond the limits heretofore well settled by the decisions of this and other courts and heretofore universally recognized, and upon the ground that this Court has ignored the admitted facts in describing the nature and purpose of the agreements involved herein.

This Court erred, we respectfully submit, in stating in its opinion (p. 5) that:

> "It is enough that the right asserted is upon express contract with the shipowner for its operation of the ship for the government and stipulates compensation both for use of the ship and for service rendered and expense incurred in its operation and maintenance, all of which undertakings are characteristically within the admiralty jurisdiction."

It is submitted that this statement is a departure from the law, heretofore well established, governing the jurisdiction of admiralty over contracts.

A contract is within the admiralty jurisdiction only if its essential object and subject-matter are wholly maritime. A contract is maritime only if it directly relates solely to commerce and navigation upon navigable waters. A contract providing compensation for the use of a ship may or may not relate solely to commerce and navigation and may or may not therefore be maritime. If a contract involving the use of a ship contains non-maritime covenants it is one over which admiralty has no jurisdiction.

Ward v. *Thompson*, 22 How. 330, was a contract which provided compensation for the use of a ship. Nevertheless, it was held to be non-maritime because it was not a mere charter-party, but involved also a division of net earnings between the owner and charterer.

In determining whether a contract involving compensation for the use of a vessel is maritime the substance rather than merely the form is decisive. *The Ada*, 250 Fed. 194 (C. C. A. 2, 1918).

The Richard Winslow, 71 Fed. 426 (C. C. A. 7, 1896) involved a contract for the use of a vessel, but it was held to be non-maritime because it was not in all respects one which related to navigation and commerce on navigable waters.

See also, *The Pennsylvania,* 154 Fed. 9 (C. C. A. 2, 1907); *The Virginia,* 1 Fed. Cas. No. 141 (Cir. Ct. 1840).

The opinion evidences no intention to repudiate these decisions or to enlarge the scope of jurisdiction in admiralty; yet upon the record the present opinion, if allowed to stand, will have the effect of changing the law of admiralty jurisdiction in a manner never before contemplated.

The Court has failed to consider the non-maritime object and purpose of the provisions of the so-called requisition charters, which fixed compensation for the taking and use of the vessels under requisition.

The Court, referring to the requisition charters, says in its opinion (p. 5):

> "The effect of the agreement was to release the petitioner's rights, growing out of the requisition, and to define the rights of the parties with respect to the use of petitioner's ships and the compensation for them, as effectively and completely and with the same consequences as though no requisition had ever been made."

The record shows the fact to be otherwise. The government has admitted, and the record shows without contradiction (R. 8, 9, 16 and 20), that the petitioner's ships were seized and at all times, before and after the contract, were retained and possessed by the

United States by virtue of the provisions of the Act of June 15, 1917. *The requisition charters specifically provided that the ships should continue to be in the possession of the United States under the requisition.* They provided (R. 17):

> "The steamship shall remain in the service of the United States under the requisition order * * * for such period of time as the United States may determine * * *."

The agreement specifically referred (R. 16) to operation of the vessels "under the requisition". Thus, the United States continued to possess and operate the vessels at all times after the execution of the requisition charters solely in the exercise of its power of eminent domain, and the rights of the United States were based, not upon written agreement, but solely upon its exercise of that power.

It is true that the so-called requisition charters fixed the compensation to be paid to the shipowner for the use of the requisitioned vessels, but these agreements did not confer any rights whatever upon the United States with reference to the vessels. The compensation which was fixed was a substitute for the compensation which would have been paid had the amount been fixed by the President or determined in judicial proceedings. The subject-matter and object of the contract in this respect was the determination of a liquidated sum to be paid to the shipowner, as or in lieu of the just compensation which would have been paid in the absence of any agreement. It is conceded that the compensation which would have been payable but for

the agreements would have been the subject of a suit at law (Opin., p. 4). The subject of the amount of compensation to be paid is none the less non-maritime because it is fixed by agreement rather than by judicial proceedings. The subject of the contract is the non-maritime subject of compensation for the seizure and use under requisition by the Government of private property. It is this essential nature and purpose of the agreements which determines jurisdiction, and not the fact that the compensation for the seizure and use happens to relate to a vessel. The contracts bear no relation to the employment of the vessels as instruments of commerce or to any maritime adventure, but solely arise out of and relate to the compensation which the United States was bound to pay in any event as the result of the seizure. It is immaterial, if it be a fact, that the requisition charters released petitioner's rights growing out of the requisition. The subject of the contracts and their purpose were solely the determination of compensation which arose out of the exercise of the governmental power of eminent domain and which was unconnected with any use to which the vessels might be devoted.

It is respectfully urged that a contract providing compensation for service rendered and expense incurred in the operation or maintenance of a ship, may or may not be maritime. *Minturn* v. *Maynard*, 17 How. 477; *Cory Bros. & Co.* v. *United States*, 51 Fed. (2d) 1010.

However, it is immaterial in the present instance whether such provisions are or are not maritime. The requisition charters were not maritime to the extent

that they fixed compensation for the use of vessels under requisition and the contracts are not, therefore, cognizable in admiralty. Admiralty is without jurisdiction over contracts which are partly maritime and partly non-maritime. *Norton* v. *The Richard Winslow*, 71 Fed. 426; *The Pennsylvania*, 154 Fed. 9; *Pacific Coast Steamship Co.* v. *Ferguson*, 76 Fed. 993; *The Ada*, 250 Fed. 194; *Graham* v. *Oregon R. & N. Co.*, 134 Fed. 454.

The present suit is based upon a claim for compensation for use of vessels under the requisition. If it does include a claim for other services maritime in their nature, nevertheless only a single amount of compensation was fixed; and that compensation, not being susceptible of separation into its component parts, may be recovered only in an action at law.

It is respectfully submitted that the opinion in this case entirely ignores the non-maritime purpose of recovering compensation for the use of a ship while under requisition and is based upon the erroneous assumption that every contract which stipulates compensation for the use of a ship is maritime.

Respectfully submitted,

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(1598)

SUPREME COURT OF THE UNITED STATES.

No. 137.—October Term, 1931.

Matson Navigation Company, Petitioner, *vs.* The United States. } On Writ of Certiorari to the Court of Claims.

[January 4, 1932.]

Mr. Justice Stone delivered the opinion of the Court.

This case is here on certiorari, 284 U. S. —, to review a judgment of the Court of Claims dismissing the petition for want of jurisdiction. — Ct. Cl. —.

The suit was brought upon a petition which alleged facts as follows: On October 15, 1917, the United States Shipping Board, under the Urgent Deficiencies Appropriation Act of June 15, 1917, c. 29, 40 Stat. 182, 183, and an Executive Order promulgated by the President on July 11, 1917, requisitioned for use by the United States seven merchant vessels then owned and operated by petitioner. On December 29, 1917, the Government, acting through the Shipping Board, entered into a contract for the operation of each ship by petitioner under a "requisition charter," the form of which was attached. It was agreed that petitioner "in consideration of the compensation provided [by the requisition charter] and the other obligations assumed by the United States . . . accepts this Requisition Charter in full satisfaction of any and all claims he has or may have against the United States arising out of the Requisition, and accepts the compensation herein provided for as the just compensation required by law . . ."

The attached form contained numerous clauses dealing with matters commonly covered by time charters. It provided that the vessel should remain in the service of the United States, to be employed as it might determine, but that petitioner should operate the vessel, furnish crew and equipment, and pay for provisions, wages, shipping fees, and supplies. The United States agreed to pay to petitioner, in addition to certain enumerated expenses of

maintenance and operation of the vessel, ship hire at the monthly rate established by the Shipping Board for vessels of like description, but with provision for terminating the charter by petitioner if the rate should be less than a specified minimum. By the tenth clause of the charter, with which we are chiefly concerned, the Government agreed to reimbuse petitioner "for any proper increases in wages and bonuses over the standard prevailing 1 August, 1917, for master, officers, and crew . . . ."

Acting under the charters, petitioner from time to time credited the Government on its books with sums received on its account, and charged it with items due petitioner, including payments of increased wages and bonuses. On October 18, 1926, petitioner entered into a second agreement with the Government, accepting a specified amount in full satisfaction of all its demands except one for the sum of $49,373.11, claimed under Clause Tenth, for the recovery of which the present suit was brought.

The Court of Claims made a special finding that the petitioner, after the petition was filed, had brought separate suits against the United States in the District Court of the United States for Northern California, to recover the amounts alleged to have been paid by it as increased wages and bonuses, and granted the Government's motion to dismiss on the sole ground that the pendency of the suits in the District Court deprived it of jurisdiction to proceed with the cause by virtue of § 154 of the Judicial Code, c. 231, 36 Stat. 1087, 1138. This section forbids prosecution in the Court of Claims of any claim for which suit is "pending in any other court . . . against any person who, at the time when the cause of action . . . arose, was, in respect thereto, acting . . . under the authority of the United States."

Petitioner insists that the jurisdiction of the Court of Claims is unaffected by the suits pending in the District Court, since § 154 denies jurisdiction to the Court of Claims only when an agent of the United States is sued simultaneously in another court; here, the United States is the defendant. The Government does not press the contention upheld by the Court of Claims, that its jurisdiction was ousted by the pendency of the petitioner's suits in the District Court. Although they were not within the language of the section, they were nevertheless regarded as within its assumed

purpose to prevent the prosecution at the same time of two suits against the Government for the same cause of action. But the declared purpose of the section (originally enacted as § 8 of the Act of June 25, 1868, 15 Stat. 77, c. 71) was only to require an election between a suit in the Court of Claims and one brought in another court against an agent of the Government, in which the judgment would not be *res adjudicata* in the suit pending in the Court of Claims (Statement of Senator Edmunds, Chairman of the Judiciary Committee, in reporting the bill to the Senate, Cong. Globe, 40th Cong., 2nd Sess., 1868, p. 2769). See *Sage* v. *United States,* 250 U. S. 33, 37; and compare *Southern Pacific Railroad Co.* v. *United States,* 168 U. S. 1, 48, 49; holding otherwise as to a judgment obtained in a suit brought against the United States in a District Court. As the words of the section are plain, we are not at liberty to add to or alter them to effect a purpose which does not appear on its face or from its legislative history. *Corona Coal Co.* v. *United States,* 263 U. S. 537, 540.

In supporting the judgment of dismissal below, the Government relies on the Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525, 526, 527, 528, by which, it is contended, jurisdiction over the asserted cause of action is vested exclusively in courts of admiralty. Section 1 of the Suits in Admiralty Act forbids the arrest or seizure of vessels owned or operated by or for the United States. Section 2 provides that where a proceeding in admiralty could be maintained, if at the time of the commencement of the action such vessel were privately owned or operated, "a libel in personam may be brought against the United States . . . provided that such vessel is employed as a merchant vessel . . .", and that "such suits shall be brought in the district court of the United States . . ."

Under these sections, jurisdiction of maritime causes of action against the United States, arising out of the operation of merchant vessels for it, is vested exclusively in the district courts. *Johnson* v. *U. S. Shipping Board Emergency Fleet Corporation,* 280 U. S. 320; *U. S. Shipping Board Emergency Fleet Corporation* v. *Rosenberg Bros. & Co.,* 276 U. S. 202. The language of § 2 is general, embracing suits on maritime causes of action by owners, as well as by third persons injured by the operation for the Government of merchant vessels. See *Eastern Transportation Co.* v. *United States,* 272 U. S. 675, 689 *et seq.*

Petitioner argues that the Suits in Admiralty Act is not applicable, because the cause of action here alleged is non-maritime in character; it contends that the so-called requisition charter is not a time charter, but a mere agreement for just compensation for the requisitioned ships, which may be recovered in the Court of Claims. But we think the cause of action is maritime, arising out of the express contract for the operation of vessels for the United States, and is not shown to be within the jurisdiction of the Court below.

It is true that under § 145 of the Judicial Code, c. 231, 36 Stat. 1087, 1136, the Court of Claims has jurisdiction of claims for just compensation for property requisitioned by the United States, but such is not the cause of action alleged. Subdivision (e) of the Emergency Shipping Fund provisions of the Urgent Deficiencies Appropriation Act of June 15, 1917, authorized the requisition of the title or possession of ships "for use or operation by the United States". It required just compensation for requisitioned ships to be fixed by the President, and provided, in case the amount was unsatisfactory to the person entitled to compensation, that 75% of it should be paid and that suit might be brought against the United States to recover such further amount as, with that already paid, would make up just compensation.

But upon seizure of the petitioner's vessels, this procedure was abandoned. By the agreement with the Shipping Board, the requisition charter was substituted for petitioner's right to receive just compensation under the Constitution and the statute. The substituted contract conferred new and different rights upon petitioner and subjected it to new obligations, not flowing from the requisition. The requisition of the ships imposed no duty on petitioner to operate them or to pay expenses of operation and maintenance after their seizure. That duty and petitioner's right to compensation for the performance of it and its right to be reimbursed for increased costs of operation, one of which is the subject of the present suit, arose from the contract alone. Such compensation and reimbursement are not included in just compensation for the requisition, even though waiver of the constitutional right was part consideration for the obligation to pay for the operation of the ships. The stipulated monthly payments to petitioner for ship hire were not measured by the just compensation

which petitioner would otherwise have been entitled to receive and might, in fact, be either more or less. The effect of the agreement was to release petitioner's rights, growing out of the requisition, and to define the rights of the parties with respect to the use of petitioner's ships and the compensation for them, as effectively and completely and with the same consequences as though no requisition had ever been made.

We need not examine the requisition charter with meticulous care to see whether it is in all respects identical with the usual charter party, which, as petitioner concedes, is maritime. *Morewood* v. *Enequist,* 23 How. 491. It is enough that the right asserted is upon express contract with the shipowner for its operation of the ship for the Government, and stipulates compensation both for use of the ship and for service rendered and expense incurred in its operation and maintenance, all of which undertakings are characteristically within the admiralty jurisdiction. Compare *New Jersey Steam Navigation Co.* v. *Merchants' Bank of Boston,* 6 How. 344, 392; *The Thomas Jefferson,* 10 Wheat. 428, 429; *The Eddy,* 5 Wall. 481, 494; *The General Smith,* 4 Wheat. 438; *James Shewan & Sons, Inc.* v. *United States,* 266 U. S. 108; *The Arlyn Nelson,* 243 Fed. 415; 3 Benedict, Admiralty (5th ed.) 82-96.

Petitioner also asserts that the present cause of action is not maintainable under the Suits in Admiralty Act because it does not appear that it arose out of the operation of the ships as merchant vessels. The Government argues that it is inferable from certain allegations in the petition, read in the light of the requisition charter, that the vessels were so used, but we do not stop to consider the argument. The burden rested upon petitioner to allege and prove a cause of action within the jurisdiction of the Court of Claims. *Johnson* v. *United States,* 160 U. S. 546, 552-553; *Merritt* v. *United States,* 267 U. S. 338; *Contzen* v. *United States,* 179 U. S. 191, 192. As the suit is against the United States upon a maritime cause of action growing out of the operation of ships for the Government, the Court of Claims is without jurisdiction if the vessels in question were operated as merchant vessels, and as the petition does not allege that they were otherwise operated, it fails to state a cause of action within the jurisdiction of the Court of Claims. As the want of jurisdiction is of the subject matter, it may be considered and appropriate judgment given at any stage of the proceedings,

either here or below. *Hilton* v. *Dickinson*, 108 U. S. 165, 168; *Gainesville* v. *Brown-Crummer Co.*, 277 U. S. 54, 59. See *Grace* v. *American Central Insurance Co.*, 109 U. S. 278, 283-284; *Börs* v. *Preston*, 111 U. S. 252, 255.

Section 2 of the Merchant Marine Act of June 5, 1920, c. 250, 41 Stat. 988, 989, did not, as petitioner contends, restore to the Court of Claims the jurisdiction previously withdrawn from it by the Suits in Admiralty Act. It repealed the Emergency Shipping Fund provisions of the Act of June 15, 1917, imposed upon the Shipping Board the duty of carrying out all contracts lawfully entered into under the repealed Act, and of settling "all matters arising out of or incident to the exercise by or through the President of any of the powers or duties conferred or imposed upon the President". It preserved to every suitor "the same right to sue the United States as he would have had if the decision had been made by the President of the United States under the acts hereby repealed." Assuming, without deciding, that the present claim is one which the Board was authorized to settle, we think it clear that the Act did not purport to enlarge existing remedies or establish a new procedure for the enforcement of maritime obligations which, like the present, are embraced within the Suits in Admiralty Act.

We have considered, but find it unnecessary to discuss, other less substantial grounds advanced for denying the applicability of the Suits in Admiralty Act. The judgment will be affirmed, but without prejudice to an application by the petitioner to the court below, if so advised, for leave to amend the petition.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.